Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

OCTOBER 2003 TERM

PATRICK MORIARTY,

Petitioner,

v.

LYNN JACK BRADT and PATRICIA BRADT,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Due Process Clause of the Fourteenth Amendment permit government interference with the child-rearing decisions of a fit parent based upon a judge's post hoc assessment of the child's interests?

2. Does the Due Process Clause of the Fourteenth Amendment require that facts necessary to justify government interference with the child-rearing decisions of a fit parent be established by clear and convincing evidence?

PARTIES TO THE PROCEEDING

The Petitioner in this case, Patrick Moriarty, is a private individual residing in the State of New Jersey, and is the custodial parent of his two minor children, Brian and Tara.

Respondents Lynn Jack Bradt and Patricia Bradt are private individuals residing in the Commonwealth of Pennsylvania. Original defendant Julia E. Bradt is deceased.

RULE 29.6 DISCLOSURE

There are no corporate parties to this proceeding.

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ON A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

Petitioner Patrick Moriarty respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of New Jersey in this case.

OPINIONS BELOW

The decision of the New Jersey Supreme Court is reported at 177 N.J. 84 and 827 A.2d 203 and is reproduced at App. A3. The per curiam opinion on the New Jersey Superior Court, Appellate Division, rendered on April 10, 2002, and the bench ruling of the New Jersey Superior Court, Chancery Division, Family Part, rendered on November 9, 2000, are both unreported, and are reproduced at App. A46 and App. A65 respectively.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on July 15, 2003. Justice Souter granted the Petitioner's application to extend the time to file a petition of certiorari to November 14, 2003. This Court has jurisdiction over this petition under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution, Section 1, provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The New Jersey Grandparents Visitation Act, N.J. STAT. ANN. § 9:2-7.1, is set forth in the Appendix (App. A92)

STATEMENT OF THE CASE

This case presents the opportunity for this Court to clarify the principles first described in *Troxel v. Granville*, 530 U.S. 57 (2000), and to articulate the limits imposed both under substantive and procedural due process that protect family autonomy from unwarranted government intrusion.

The seminal—and in petitioner's view, dispositive—fact in this case is not in dispute. Petitioner Patrick Moriarty is a fit custodial parent (App. A83) who seeks to make child-rearing decisions regarding his two minor children, Brian (age 16) and Tara (age 13), by directing the extent and nature of their contact with other non-parental family members, including their maternal grandparents. Although he was, and is, willing to allow his late ex-wife's parents, Lynn and Patricia Bradt, monthly visits with his children, they are unsatisfied with the extent of that contact, and instituted this action to require more expansive visitations with their grandchildren than is appropriate in Mr. Moriarty's parental judgment.

Patrick Moriarty and the late Julia Bradt were married in 1987 and had two children: Brian in 1987 and Tara in 1990. *Moriarty v. Bradt*, 177 A.2d 203, 205 (N.J. 2003) (App. A3). The couple thereafter separated and Moriarty filed for divorce. At the time of the separation, Bradt was hospitalized for drug abuse and thus the children remained with Moriarty. *Id.* The Bradts intervened in the divorce action in an attempt to secure visitation with their grandchildren. *Id.* In September, 1991, Mr. Moriarty and the Bradts reached a pendente lite agreement whereby Moriarty would have custody of Brian and Tara and the Bradts would have regular visitation. *Id.*

On April 15, 1993, a final judgment of divorce was entered between Mr. Moriarty and Julia Bradt. Both Moriarty and Bradt had proven their claims of extreme cruelty and Moriarty had additionally proven that Bradt was an habitual drug user. *Id.* at 206 (App. A3-A4). As a result, Moriarty was granted sole custody of the children. Both parties subsequently remarried. Julia Bradt was granted

supervised visitation with her children in the presence of the Bradts.[1]

It is undeniable that significant animosity has developed between Moriarty and the Bradts. As is inherently the case in intimate family matters, however, the task of assessing "blame" for this unhappy situation is not one that is susceptible of being undertaken competently by an external authority. It should be sufficient to note that Mr. Moriarty felt he had reason for concern about unsupervised contact between the Bradts and his children.

In 1994 Julia Bradt was allowed unsupervised visits with her children, but often her parents would be present as well. Several accidents occurred to Brian Moriarty while in his grandparent's care (including serious burns and a broken leg), which caused Mr. Moriarty to believe his children were not safe while in the unsupervised care of their grandparents.

Julia Bradt died on November 8, 1999, apparently from an overdose of prescription pain medication and cold medicine. *Id.* After consulting with his priest and a bereavement counselor, Mr. Moriarty decided that it was in the best interests of his children that they should not attend their mother's funeral. *Id.* In response to this decision, the grandparents immediately instituted an emergent judicial proceeding to order the children's attendance at the funeral. This motion was granted, and the trial court further ordered "regular and continual visitation with the grandparents." *Id.*

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1. Julia Bradt was ordered to continue psychiatric therapy; required to undergo random weekly drug testing with the results forwarded to Moriarty; ordered to abstain from non-prescription drug and alcohol use; and required to attend weekly meetings of Alcoholic Anonymous and other support groups. Moreover, Bradt and the grandparents were forbidden to have the children treated medically except in an emergency situation. *Moriarty v. Bradt*, 177 A.2d 203, 206 (N.J. 2003) (App. A4).

On December 3, 1999, the grandparents again petitioned the court, this time for holiday visitation with the children after Mr. Moriarty had refused their request. *Id.* After a hearing, a consent order was entered giving the grandparents visitation during the holidays, and granting them further consecutive overnight visits every five weeks, pending a hearing on the merits of the dispute. *Id.* at 207 (App. A5).

The trial court then ordered diagnostic evaluations of Moriarty, the grandparents, the children, and Julia Bradt's second husband. The Family and Social Services Federation, after performing these evaluations, filed a report opining that the Bradts could "serve as a conduit with the children's deceased mother and can be a positive resource for the children in many ways," and recommending that the grandparents be granted unsupervised visitation with the children. *Id.* at 207 (App. A6). The report also recommended that the grandparents have holiday visitation with the children, attend the children's weekend activities, and have regular phone and email contact with them. *Id.* If after a period of time there were no issues or problems, the report recommended that visitation occur once a month at the grandparent's home, so long as the children's scheduled activities were not interrupted. *Id.*

In June, 2000, Mr. Moriarty filed a motion for summary judgment on the issue of grandparent visitation in light of this Court's ruling in *Troxel v. Granville*, 530 U.S. 57 (2000), which had just been decided. Despite his concerns regarding his children's welfare while in the Bradts' care, Mr. Moriarty offered a visitation schedule that he believed to be in the best interests of the children. He would allow the grandparents to visit his children one Saturday or Sunday each month during an activity of one or both of the children. *Moriarty*, 177 A.2d at 207 (App. A7). After the activity the

grandparents could spend two hours with the children for lunch or dinner. By the fifth of each month Mr. Moriarty would provide the grandparents with the dates, times and places of the activity or activities they would be invited to attend. *Id.* at 208 (App. A7).

During the hearing on his motion for summary judgment, Moriarty argued that *Troxel* required the court to defer to his decision "as a fit parent." 177 A.2d at 207-08 (App. A7). The grandparents countered that Moriarty was effectively offering no visitation, and although they conceded that a fit parent's decision on visitation was entitled to "some deference," they argued that the New Jersey statute mandated a hearing to decide the issue, using a "best interest of the child" standard. The trial court denied Moriarty's summary judgment motion and ordered a plenary hearing to afford the grandparents the opportunity to present expert testimony and their witnesses, but it did note that the grandparents carried "an extremely heavy burden" under the ruling in *Troxel.*

A plenary hearing was concluded on October 20, 2000. *Id.* (App. A8). On November 9, 2000, the trial court rendered its decision (App. A65) and ordered that the Bradts be awarded visitation as follows: (1) monthly visitation alternating between a five-hour day visit one month near the children's home in New Jersey, and a visit with two overnights the next month at the Bradt's home in Pennsylvania, and (2) one extended visitation period in July or August. In deciding to override the judgment of Mr. Moriarty in limiting visits to one four hour visit per month, the trial court relied upon the testimony of Dr. Judith Grief, the Bradt's expert. Although Dr. Greif never met any of the parties and based her evaluation solely on the written Family Services report, she nevertheless opined that abiding by the visitation schedule proffered by Mr. Moriarty would cause psychological harm to the children by fostering the

perception that Mr. Moriarty's alleged plan to alienate them from their grandparents was succeeding. (App. A84). As the trial judge explained further:

> The reason that I am interfering, if you will, with Mr. [Moriarty]'s desire with regard to this other visit is to protect the children from the harm that would befall them if they were alienated from their grandparents. This trip once every two months for two overnights would allow the children to be in the environment of their grandparents. Allow them to continue to go on outdoors activities. To continue from time to time through the year to meet with their cousin Natalie. To have other family activities with the extended family of their mother. And to know that they are still a full and complete part of that family.

(App. A85). The trial judge thus apparently concluded, based upon the report of an expert who never interviewed the parties, that requiring visits in which the children would be "be in the environment of their grandparents," and thus outside the control of their fit custodial father, was necessary to avoid "harm."

On appeal, the Appellate Division of the New Jersey Superior Court reversed the judgment to the extent that the trial court's order required visitations on terms more expansive than Mr. Moriarty was prepared to allow, i.e. monthly visits of four hours duration. Interpreting *Troxel v. Granville*, 530 U.S. 57 (2000), the Appellate Division concluded that Mr. Moriarty's judgment as a fit parent regarding the extent of visitations by a non-parent should be sustained. (App. A64). The court held that Moriarty's "substantive due process rights were violated by the imposition of the visitation ordered," when he had offered the grandparent's some visitation time. (App. A63) The

Appellate Division found that after *Troxel*, "interference with plaintiff's parental decision to afford the limited visitation offered was constitutionally impermissible." (App. A64).

The Supreme Court of New Jersey reversed the Appellate Division. *Moriarty v. Bradt*, 177 A.2d 203 (N.J. 2003) (App. A2). The court conceded that "Because the Grandparent Visitation Statute is an incursion on a fundamental right (the right to parental autonomy) . . . it is subject to strict scrutiny and must be narrowly tailored to advance a compelling state interest." It therefore required a predicate showing of "harm" in order to rebut the presumption in favor of parental discretion. "However, when harm is proved and the presumption in favor of a fit parent's decision making is overcome, the court must decide the issue of an appropriate visitation schedule based on the child's best interests." *Id.* at 222 (App. A33).

Although the New Jersey Supreme Court did not offer any functional or doctrinal definition of "harm" sufficient to satisfy its constitutional analysis, logically the "harm" in this case that formed the basis of the court's decision was the incremental difference between the contact with the children afforded under Mr. Moriarty's plan (one four hour visit each month) and the plan demanded by the Bradts (monthly visits alternating between a five hour visit and an overnight visit at the Bradts' home in Pennsylvania). Apparently, in the view of the Bradts' expert, Dr. Grief, the mere imposition by Mr. Moriarty of any limit to visitation less than that which the Bradts demanded would trigger self-esteem problems in the children by being "alienated" from their grandparents. *Id.* at 227 (App. A42).

The majority opinion, however, expressly rejected the contention that the "harm" that provided the factual predicate to justify state intrusion into the right of parental autonomy

must be established by "clear and convincing evidence" that has been utilized in other cases in which fundamental rights are at stake. Drawing a distinction between an award of custody to a third party and an order of visitation over the objection of a fit parent, the court approved "the preponderance of the evidence burden in the statute as fully protecting the fundamental rights of parents when coupled with the harm standard." On this issue, Justice Verniero dissented in part, and would have required that a finding of demonstrable harm be proved by a "clear and convincing evidence." *Id.* at 228.

> [B]ecause the court necessarily acts with less than complete knowledge and understanding of all the complex factors that are relevant in making this determination, and because special deference must be afforded to the wishes of the parent, an additional procedural safeguard is needed to compensate for this inherent limitation in the judicial fact-finding process...
>
> In allegations of psychological harm, it is often easy, and perhaps too easy, to articulate a colorable claim of such harm and thereby undermine parental judgment. Thus, the "clear and convincing evidence" standard can be of very real assistance in mandating adherence to constitutional norms, particularly in cases such as this, where the "harm" that would allegedly result from curtailing, but not eliminating, visitation between the Bradts and their grandchildren has been colorably articulated, but perhaps not convincingly demonstrated.

Id. at 228-29 (Verniero, J., dissenting in part) (quoting *amicus* brief of ACLU of NJ).

REASONS FOR GRANTING THE WRIT

In *Troxel v. Granville*, 530 U.S. 57 (2000), a plurality of this Court observed, pursuant to the Due Process Clause, that:

> so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Id. at 68-69. Thus, the Washington trial court in *Troxel* erred when "it gave no special weight at all to Granville's determination of her daughters' best interests." *Id.* at 69. "[T]the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Id.* at 73-74.

While widely accepted as normative principles, reduction of *Troxel*'s teachings to a coherent doctrinal framework on the level of deference to be afforded parental judgment in child-rearing decisions has proved to be a daunting task. Of course, because Washington statute at issue in *Troxel* was so "breathtakingly broad" that it "effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review" (*id.* at 67), the Court was able to dispose of the case on facial overbreadth grounds without addressing the substantive due process issues presented, including: (1) whether the Due Process Clause requires all nonparental visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation, (2) if some form of 'harm" is

required, what qualitative or quantitative elements define it, so as to give parental judgment the constitutionally required "special weight."

In the three years since *Troxel*, the appellate courts of at least 33 states have attempted to interpret the decision in the context of grandparent visitation. Those cases can be accurately described as canvassing the spectrum from straightforward application of a "best interests of the child" balancing test to a requirement of demonstrable harm by clear and convincing evidence. The frank disagreement in interpreting *Troxel*, and in addressing the questions that the Court left unanswered in that case, is causing confusion in an area where clarity is especially required: the proper limits under substantive due process of external judicial intervention in family autonomy, and the requirements of procedural due process in establishing the predicate facts that justify such extraordinary intervention.

Timing is also a critical issue. As this Court has noted, all fifty states have some form of grandparent visitation statute,[2] and judicial intervention in such intra-family disputes is becoming commonplace. Families, social institutions and state legal systems are being forced to structure themselves, and fashion intimate relationships, in reliance upon varying and sometimes conflicting state interpretations of *Troxel*. Once the cultural and doctrinal mortar hardens around these relationships, revision by this Court will become disruptive. While in some situations it may be advisable to allow time for legal issues to "percolate" before this Court revisits a subject matter, here it may be exceedingly difficult to wait, and then later attempt to provide guidance and reconcile different approaches, without

2. *Troxel*, 530 U.S. at 73 n.1 (collecting state statutes).

causing major turmoil in settled expectations that have arisen in the meantime.

I. THIS COURT SHOULD ARTICULATE A SUBSTANTIVE DUE PROCESS STANDARD BY WHICH VISITATION STATUTES ARE EVALUATED.

The interests of parents in the care, custody and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court as warranting heightened protection. Almost a century ago in *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923), the Court held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children." Two years later in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), the Court again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." The Court revisited the subject in *Prince v. Massachusetts*, 321 U.S. 158 (1944), and reaffirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. Elaborating on that right, the Court declared that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at 166. Finally, this Court has described the "primary role" of parents in raising their children as "an enduring American tradition" that is deeply embedded in history and culture. *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972).

More than 75 years after deciding *Meyer*, the Court declared "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the

fundamental right of parents to make decisions concerning the care, custody and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Indeed, the plurality holding in *Troxel* follows a long line of cases that seek to ensure that the decisions of parents concerning the upbringing of their children are not unnecessarily disturbed by the State. Importantly, this safeguard against state interference engendered by the fundamental right in childrearing extends to all of the decisions, actions and determinations which collectively constitute parental autonomy. In fact, parenting encompasses not only the mere custody of a child, but it is comprised of the aggregation of many tasks, responsibilities and decisions.

A brief survey of states that have addressed grandparent visitation statutes after *Troxel*, however, graphically demonstrates the confusion and variant interpretations that plague this area of law in the absence of a clear standard articulated by this Court. *See generally* K. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 Fam. Ct. Rev. 14 (2003) (surveying state decisions after *Troxel*).

Although this Court expressly reserved judgment on the issue, a number of courts have extended *Troxel* to require satisfaction of a "substantial or "significant harm" standard before judicial interference with parental judgment is permitted. *Blixt v. Blixt*, 437 Mass. 649, 774 N.E.2d 1052 (2002); *Neal v. Nesvold*, 14 P.3d 547 (Okla. 2000); *Griffin v. Griffin*, 41 Va. App. 77, 581 S.E.2d 899 (2003); *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769 (1995).

Some states, perhaps prompted by Justice Thomas' concurring opinion, interpret *Troxel* as imposing a "strict scrutiny" analysis before parental judgment is overridden by

the state, in a context in which mere invocation of that level of scrutiny essentially determines the result. As the Alabama Court of Civil Appeals stated:

> The involuntary removal of a child from a parent and the forced placement of the child, even temporarily, in the exclusive custody and control of a third party go to the core of what is fundamental about the parents' right in the care, custody, and control of their children. While, under normal circumstances, it might be viewed as unnatural for a parent to deny any access whatsoever by a grandparent to a grandchild, it is by no means "unnatural" for a parent to make decisions as to whether and to what extent a child should be released to a grandparent's exclusive custody for overnight and other unsupervised visits. It is in this context that we consider the parental right herein at issue to be a fundamental "liberty" interest protected by the Fourteenth Amendment.

R.S.C. v. J.B.C., 812 So. 2d 361, 367 (Ala. Ct. Civ. App. 2001) (denying grandparent overnight visitation request once "strict scrutiny" invoked). *See*, *Linder v. Linder*, 348 Ark. 322, 72 S.W.3d 841 (2002) (finding state grandparent visitation statute unconstitutional as applied under strict scrutiny analysis); *Lulay v. Lulay*, 193 Ill. 2d 455, 739 N.E.2d 521 (2000) (same).

Other courts, however, have rejected application of the "strict scrutiny" analysis in the context of grandparent visitation petitions. *Fenn v. Sherriff*, 109 Cal. App. 4th 1466, 1489, 1 Cal. Rptr. 3d 185, 203 (2003) (mere fact that defendant and his wife are subject to a visitation petition is not a real and appreciable impact on, or a significant interference with the exercise of their fundamental right to make parenting decisions); *In re G.P.C.*, 28 S.W.3d 357

(Mo. Ct. App. 2000) (upholding visitation statute and rejecting application of strict scrutiny standard). Indeed, the Indiana courts have applied the forgiving "rational basis" test in upholding that state's grandparent visitation statute. *Crafton v. Gibson*, 752 N.E.2d 78, 90-91 (Ind. Ct. App. 2001).

Connecticut has imposed one of the most demanding interpretations of *Troxel*, when it requires that a person petitioning for visitation allege and establish that (1) she had a parent-like relationship with the child, and (2) there is clear and convincing evidence that the child would suffer real and significant harm if visitation were denied. *Crockett v. Pastore*, 259 Conn. 240, 246, 789 A.2d 453, 407 (2002); *Roth v. Weston*, 259 Conn. 202, 789 A.2d 431 (2002). And the Illinois and Iowa supreme courts have now declared their grandparent visitation statutes *facially* unconstitutional in light of *Troxel*. *Wickham v. Byrne*, 199 Ill. 2d 309, 769 N.E.2d 1 (2002); *Santi v. Santi*, 633 N.W.2d 312 (Iowa 2001); *In re Marriage of Howard*, 661 N.W.2d 183 (Iowa 2003).

Some cases focus on the overbreadth of the Washington statute at issue in *Troxel*, and thus narrow the scope of petitioners eligible to invoke their visitation statute. Once so narrowed, however, these courts uphold straightforward application of the "bests interests of the child" balancing test, despite the strong criticism of the *Troxel* plurality of uncritical use of that malleable standard in parent vs. non-parent disputes. *See Currey v. Currey*, 650 N.W.2d 273 (S.D. 2002) (upholding South Dakota statute's "best interests" inquiry as constitutional because standing limited to grandparents); *Wood v. Wood*, 835 So. 2d 568 (La. Ct. App. 2002); *Zeman v. Stanford*, 789 So. 2d 798 (Miss. 2001); *State ex rel. Brandon L. v. Moats*, 209 W. Va. 752, 551 S.E.2d 674 (2001). The Rhode Island Supreme Court,

however, has carried this proposition so far as to suggest that, pursuant to state statute, a de facto or functional parental relationship with the child might be required before it would grant a visitation petition, *Rubano v. DiCenzo*, 759 A.2d 959, 967 (R.I. 2000), a rule would preclude many if not most grandparents from applying.

Many decisions merely note that *Troxel*'s command that "special weight" be given to the parental determination was not followed in a particular case, and reverse a visitation order on that basis, but do not attempt to provide a functional definition of the quantum of "weight" that is required to pass constitutional muster. *See*, *Zasueta v. Zasueta*, 102 Cal. App. 4th 1242, 126 Cal. Rptr. 2d 245 (2002) (assessing whether requisite weight to parental judgment was given on "case by case basis"); *DeRose v. DeRose*, 469 Mich. 320, 666 N.W.2d 636 (2003) (striking down visitation statute for failure to give weight to parental judgment); *Ford v. Frazier*, 2003 Ohio 1087, 2003 Ohio App. LEXIS 1035 (Ct. App. 2003) (declining to define "special weight" but finding that trial court had not afforded it); *P.B.C. v. J.D.M. (In re C.M.)*, 74 P.3d 342 (Colo. Ct. App. 2002) (remanding and requiring trial court to afford mother's proposed schedule special weight); *State v. Paillet*, 270 Kan. 646, 16 P.3d 962 (2001) (striking down state grandparent statute as unconstitutional and reversing visitation order); *Brice v. Brice*, 133 Md. App. 302, 754 A.2d 1132 (2000) (upholding fit parent's denial of unsupervised visitation to grandparents under *Troxel*); *Roby v. Adams*, 68 S.W.3d 822 (Tex. App. 2002) (same). *But see*, *Hertz v. Hertz*, 291 N.Y.A.D.2d 91, 738 N.Y.S.2d 62 (2002) (upholding visitation statute after construing it to require deference to parental discretion); *Harrington v. Daum*, 172 Ore. App. 188, 18 P.3d 456 (2001) (upholding statute after integrating *Troxel*'s "significant weight" requirement); *Baker v. Baker*, 2003 Ohio 731, 2003 Ohio App. LEXIS 68 (Ohio Ct. App. 2003) (upholding visitation order after inferring that

trial judge, without explicitly saying so, gave special deference to parental judgment).

Other states interpret *Troxel* as merely giving parental discretion a relatively weak and rebuttable presumption of validity that merely dictates the order and burden of proof. *E.g.*, *McGovern v. McGovern*, 201 Ariz. 172, 177, 33 P.3d 506, 511 (2001) (overruling trial court and ordering grandparental visitation); *see also Spaulding v. Williams*, 793 N.E.2d 252 (Ind. Ct. App. 2003) (presumption in favor of parental judgment overcome when court concluded father's motive was "selfish"). On the other hand, Vermont gives a more potent meaning to the concept of "presumption" in favor of parental judgment by requiring a showing of "compelling circumstances" in order to overcome it. *Glidden v. Conley*, 820 A.2d 197 (Vt. 2003).

The test applied in this case below is somewhat of a hybrid. The New Jersey Grandparent Visitation Statute provides explicitly that the trial judge shall enter a visitation order when the applicant shows "by a preponderance of the evidence that the granting of visitation is in the best interests of the child." N.J. STAT. ANN. § 9:2-7.1(a). It therefore adopts the least deferential standard regarding parental discretion. In the decision below, however, the New Jersey Supreme Court ostensibly added the requirement of a showing of "harm" to the child, but it did so in a way as to deprive it of much practical effect in giving deference to the decision of a fit parent. First, the court required that the "grandparents bear the burden of establishing by a preponderance of the evidence that visitation is necessary to avoid harm to the child." *Moriarty*, 177 N.J. at 117, 827 A.2d at 222. In so doing, the court posed a question that, under the facts of this case, was completely irrelevant, since Mr. Moriarty has been willing to allow the Bradts regular monthly visitation with his children, and therefore the

"harm" that would have flowed from preventing visitation completely was not at issue. At most, the "harm" at issue here is the incremental harm that would be caused by limiting the grandparents to monthly day visits as opposed to alternating monthly day visits and overnight visits in the Bradt's home in Pennsylvania, plus an extended summer visit.

The court below did observe that "[w]hen visitation is not denied outright but the grandparents challenge the sufficiency of the proffered schedule, the same standard will apply. They will be required to prove that visitation is necessary and that the proffered visitation schedule is inadequate to avoid harm to the child." *Moriarty*, 177 N.J. at 118, 827 A.2d at 223. However, in the context of this case, that standard still incorporates the irrelevant inquiry of whether visitation itself is necessary to avoid harm to the child. Moreover, the potential *incremental* harm caused by Mr. Moriarty's decision not to permit unsupervised overnight visits in which the children were in the temporary custody of the grandparents has never been articulated, beyond the trial judge's somewhat conclusory observation that allowing them to be in "the environment of their grandparents" would enhance their perception that they are still a "full and complete part" of that family. The trial court thereby contravened Mr. Moriarty's parental judgment as to whether that level of contact was in the bests interests of his children."

Whether the test of "adequacy" has been satisfied, however, is not susceptible to empirical proof or disproof. The level of visitation that is either "adequate" or "inadequate" is in large measure not a factual issue, but rather a value judgment and a balancing of competing familial interests. *Troxel* however, must at least stand for the proposition that the fit parent's value system and evaluative

opinion must be given special deference in making childrearing decisions, and thus it is inconsistent with that deference to borrow a "reasonable," or judicially created, value system in order to make the initial determination of whether 'harm" exists.

Having invited the grandparents to present evidence, based upon the minimal "preponderance of the evidence" standard, on the hypothetical issue of whether harm would ensue to the children if visitation did not occur, the New Jersey Supreme Court then removed any restrictions on judicial intervention, once that showing was made. In its view, "when harm is proved and the presumption in favor of a fit parent's decision making is overcome, the court must decide the issue of an appropriate visitation schedule based on the child's best interests." *Moriarty*, 177 N.J. at 117, 827 A.2d at 224. There is therefore no requirement there exist a nexus between the resulting visitation order and the nature of the "harm" demonstrated. "The presumption in favor of parental decision making having been overcome, the court should approve a schedule that it finds is in the child's best interest, based on the application of the statutory factors." *Id.* In other words, once the finding of hypothetical harm has been made, all bets are off, and the issue of visitation becomes a matter committed solely to the court's discretion, without any requirement that the remedy be tailored to the state interest demonstrated.

There are thus at least half a dozen different strains of constitutional analysis that state courts have gleaned from *Troxel v. Granville*, and an additional number of hybrid permutations and combinations of those strains, all of which contribute to the doctrinal confusion that currently pervades this area of the law. For those reasons, this Court should accept review and bring doctrinal coherence to this troubled area of constitutional jurisprudence.

II. THIS COURT SHOULD ANNOUNCE A PROCEDURAL DUE PROCESS STANDARD THAT REQUIRES A SHOWING OF CLEAR AND CONVINCING EVIDENCE BEFORE PARENTAL JUDGMENT CAN BE OVERRIDDEN.

As this Court has emphasized, "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). Thus, *"Addington* . . . teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982) (citing *Addington v. Texas*, 441 U.S. 418 (1979)).

In an ordinary civil dispute over money damages, application of a preponderance of the evidence standard indicates both society's "minimal concern with the outcome, and a conclusion that the litigants should "share the risk of error in roughly equal fashion." *Santosky*, 455 U.S. at 755 (quoting *Addington*, 441 U.S. at 423). When the State brings a criminal action to deny a defendant of liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." *Santosky*, 455 U.S. at 755. The stringency of the "beyond a reasonable

doubt" standard bespeaks the "weight and gravity" of the private interest affected, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society [impose] almost the entire risk of error upon itself." *Id.* (quoting *Addington*, 441 U.S. at 424, 427).

In applying these procedural due process principles, this Court has recognized the fundamental liberty rights associated with parenting warrant a heightened concern about the risk of error. "*Lassiter* declared it 'plain beyond the need for multiple citation[s]' that a natural parent's 'desire for and right to 'the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right." *Santosky*, 455 U.S. at 758-59 (finding that the clear and convincing standard is necessary in proceedings to determine termination of parental rights). The "Due Process Clause does not permit a State to infringe on the fundamental rights of parents to make childbearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 U.S. at 72-73. Although the Court did acknowledge that these determinations will necessarily come before state courts, "special weight" must be given to parental judgment. *Id.* at 70. This procedural aspect of such "special weight" requires a higher evidentiary burden when overruling the judgment of the parents in visitation matters. But, in the three years since the *Troxel* decision, states have reached conflicting results as to the proper evidentiary standard of review.

Some state legislatures, perhaps presaging the constitutional standard, explicitly require a showing of "clear

and convincing evidence" as part of the statutory scheme.[3]

Some states impose a "clear and convincing evidence" of harm standard as a gloss on the state statute, even though the statute itself does not require it. *See Scott v. Scott*, 80 S.W.3d 447 (Ky. App. 2002) (grandparent visitation over objections of fit custodial parents only upon clear and convincing evidence of harm to child).. For instance, in *In re Marriage of Harris*, 92 Cal. App. 4th 499, 517, 112 Cal. Rptr. 2d 127 (2001), *petition for review granted sub nom. Butler v. Harris*, 115 Cal. Rptr. 2d 191, 37 P.3d 379 (Cal. 2002), the court said that "When a fit parent objects to visitation, the grandparent must bear the burden of demonstrating by clear and convincing evidence that the parent's decision regarding visitation would be detrimental to the child." 92 Cal. App. 4th at 517, 112 Cal. Rptr. 2d at 141; *accord, In re Marriage of Gayden*, 229 Cal. App. 3d 1510, 280 Cal. Rptr. 862 (1991). The California Court of Appeals noted:

> But when a constitutional right is at stake, a significant quantum of proof must be required to afford adequate protection of that right. Otherwise, we risk having a court substitute its own views for those of a fit parent. By mandating a grandparent to show by the higher standard of clear and convincing evidence that a fit parent's decision against visitation would be detrimental to the child, we are precluding a court from overriding a parent's child rearing decision merely on the basis of the court's contrary view.

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3. *E.g.*, REV. STAT. NEB. § 43-1802; NEV. STAT. 125C.050(4); R.I. GEN. LAWS § 15-5-24.3 [a][2][v]; VA. CODE ANN. § 20-124.2; WASH. REV. CODE § 26.09.240.

Harris, 92 Cal. App. 4th at 518, 112 Cal. Rptr. 2d at 142.

Similarly, the Connecticut Supreme Court recently held in *Roth v. Weston*, 259 Conn. 202, 789 A.2d 431 (2002), that the "clear and convincing evidence" standard was required in overruling parental judgment in visitation cases. "We believe the stricter standard of proof is sounder because of the ease with which a petitioning party could otherwise intrude upon parental prerogative." *Id.* at 232, 789 A.2d at 448. *Roth* recognized the dangers inherent in any visitation proceeding: "The prospect of competent parents potentially getting caught up in the crossfire of lawsuits by relatives and other interested parties demanding visitation is too real a threat to be tolerated in the absence of protection afforded through a stricter burden of proof." *Id. Cf. Clarke v. Wade*, 273 Ga. 587, 544 S.E.2d 99 (2001) (in custody determination, "best interest" standard interpreted to require clear and convincing evidence that the child would suffer physical or emotional harm if custody awarded to the biological parent); *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769 (1995) (Georgia grandparent visitation statute unconstitutional even when grandparents had burden of proving the appropriateness of visitation by clear and convincing evidence).[4]

Other states adopt a "clear and convincing evidence" standard, but rather than apply it to an empirical determination of "harm" or detriment to the child, they instead require that a "grandparent seeking visitation bears the burden of showing, by clear and convincing evidence, that the best interest of the child is served by awarding

4. In contrast, some states refuse to articulate any evidentiary standard at all. *P.B.C. v. J.D.M. (In re C.M.)*, 74 P.3d 342 (Colo. App. 2002) ("We anticipate that the appropriate considerations will emerge on a case-by-case basis), *cert. denied sub nom. Carey v. McMillin*, 2003 Colo. LEXIS 644 (Colo., Aug. 4, 2003).

grandparent visitation." *L.B.S. v. L.M.S.*, 826 So. 2d 178, 186 (Ala. 2002); *See*, *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417 (1998) (upholding visitation statute when construed to require clear and convincing evidence of best interests of child; *Steward v. Steward*, 111 Nev. 295, 890 P.2d 777 (1995) (construing repealed statute as permitting grandparent visitations only on clear and convincing evidence of best interests of child).

Conjoining the "clear and convincing evidence" test with the "bests interests of the child" inquiry, however, confuses analytically distinct concepts.[5] Evidentiary burdens of proof—whether preponderance of the evidence, clear and convincing evidence, or beyond a reasonable doubt—can be applied logically only to some empirically provable issue of *fact*, such as harm. The "best interests of the child" inquiry, however, is not a determination of fact, but rather is a matter of evaluative opinion that subsumes within it an inherently value driven judgment of which interests are "best," or at least which are "better" than others. One could therefore no more establish the "best interests of the child" by the clear and convincing evidence standard that one could establish, clearly and convincingly, that a painting is beautiful or a book is boring. And of course, in applying the "best interests of the child analysis, it is inevitably the value system of the judge, not the parent, that determines the outcome. Application of the "clear and convincing evidence" test to the "best interests of the child" inquiry is little different from the

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5. Four judges in *L.B.S.* would have limited the constitutionally appropriate inquiry to whether "it can be shown by clear and convincing evidence that prohibiting grandparent visitation would cause substantial harm to the child." A majority, however, did not agree "that the showing of substantial harm is the only situation in which that statute can be constitutionally applied," and therefore applied the clear and convincing evidentiary standard to "bests interests of the child analysis. *L.B.S. v. L.M.S.*, 826 So. 2d 178, 186 n.5 (Ala. 2002).

result the *Troxel* plurality sought to avoid, where "a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." *Troxel*, 530 U.S. at 67.

Finally, some states do not require any enhanced evidentiary burden at all. *See Babin v. Babin*, 2003 La. App. LEXIS 2187 (La. App. 2003); *Galjour v. Harris*, 795 So. 2d 350 (La. App. 2001) (upholding "bests interests of the child inquiry without "clear and convincing evidence" standard); *Crafton v. Gibson,* 752 N.E.2d 78 (Ind. App. 2001) (upholding grandparent visitation upon showing by preponderance of evidence of best interests of child). Here, although the New Jersey Supreme Court determined that parental rights should be afforded a higher constitutional protection, it declined to extend the clear and convincing evidence standard to grandparent visitation, stating that the visitation is not as great an invasion "of family autonomy and privacy" as a custody hearing, for example. *Moriarty v. Bradt*, 177 N.J. 84, 116, 827 A.2d 203, 223 (2003).

The court below reasoned that because a visitation order is not as intrusive as a custody order, a heightened standard of proof was not required. "The former is obviously a greater invasion of family autonomy and privacy than the latter." *Id.* It is the *quality* of the individual right affected that determines the burden of proof required by procedural due process, however, not its perceived quantity. The judgment of a fit parent regarding who has contact with his child, and in whose custody and protection the child is entrusted, even temporarily, is just as much a part of the fundamental rights of family autonomy as more long term decisions, such as where the child goes to school or what church, if any, they attend. The aggregation of seemingly

minor parenting decisions and judgments made in the course of everyday life are just as descriptive of the parenting process, and just as vital to the overall exercise of parental discretion, as are determinations that judges might think are of greater import. Here, a parent's "right to the companionship, care, custody, and management of his or her children" (*Santosky*, 455 U.S. at 758) is precisely the liberty interest that the Due Process Clause protects. Protection of that right should not depend upon whether judges, applying their own scale of importance, deem such intrusion to be *de minimis*.

CONCLUSION

In a superficial sense, the difference between Mr. Moriarty's plan to permit monthly four hour visits between his children and the Bradts, and the Bradts' demand to have five hour visits interspersed with bi-monthly overnight visits at their home, may not seem to be a dispute of constitutional dimension. But the New Jersey Supreme Court's willingness to permit judicial interference with parental autonomy in order to make such incremental adjustments is the very reason why its ruling stands in stark contrast to the *Troxel* plurality's observation that there will "normally be no reason for the State to inject itself into the private realm of the family" to second guess the judgment of a fit parent.

For the reasons expressed above, Petitioner Patrick Moriarty respectfully urges that this petition for writ of certiorari to the Supreme Court of New Jersey be granted.

Respectfully submitted,

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SUPREME COURT OF NEW JERSEY
A-145 September Term 2001

PATRICK MORIARTY,

Plaintiff-Respondent,

v.

JULIA E. BRADT,

Defendant,

and

LYNN JACK BRADT and PATRICIA BRADT,

Intervenors-Appellants.

Argued January 21, 2003 – Decided July 14, 2003

On certification to the Superior Court, Appellate Division.

Francis W. Donahue argued the cause for appellants (*Donahue, Hagan, Klein & Newsome*, attorneys; *Mr. Donahue*, *Eric S. Solotoff* and *Jennifer E. Jacobson*, on the briefs).

Robert T. Corcoran argued the cause for respondent (*Mr. Corcoran*, attorney; *Mr. Corcoran* and *Christopher R. Cavalli*, on the briefs).

Ronald K. Chen argued the cause for *amicus curiae* American Civil Liberties Union of New Jersey (*Mr. Chen* and *J.C. Salyer*, attorneys).

Walter A. Lesnevich and *Rochell Babroff*, a member of the District of Columbia and Maryland bars, submitted a brief on behalf of *amicus curiae* AARP Foundation Litigation (*Lesnevich & Marzano-Lesnevich*, attorneys).

The opinion of the Court was delivered by

LONG, J.

In *Troxel v. Granville*, 530 *U.S.* 57, 120 *S. Ct.* 2054, 147 *L. Ed.* 2d 49 (2000), the United States Supreme Court struck down what it denominated as a "breathtakingly broad" grandparent visitation statute enacted by the State of Washington. That decision has cast a cloud over the grandparent visitation statutes of the remaining forty-nine states. In this case, we are called on to assess our own Grandparent Visitation Statute (*N.J.S.A.* 9:2-7.1) in light of *Troxel* and in light of our prior jurisprudence on the subject. More particularly, because the grandparents in this case seek to override the father's determination regarding visitation, we are asked to test the statute against the fundamental right of fit parents to make decisions regarding the care and custody of their children. We hold that grandparents seeking visitation under the statute must prove by a preponderance of the evidence that denial of the visitation they seek would result in harm to the child. That burden is constitutionally required to safeguard the due process rights of fit parents. Finally, we hold that, in this case, the grandparents have met that burden.

I

Julia Bradt and Patrick Moriarty were married on April 26, 1987. The marriage resulted in the birth of two children, Brian in 1987 and Tara in 1990. Eventually the couple separated and Moriarty instituted a divorce action. At the time of the separation, Bradt was hospitalized for drug abuse and the children remained with Moriarty. In order to secure visitation time with Brian and Tara, Bradt's parents, Lynn Jack Bradt and Patricia Thornton Bradt (the grandparents), intervened in the divorce action.

A hearing was held on September 25, 1991. At that time, Bradt withdrew her application for custody and the parties reached an agreement regarding custody and visitation. On October 28, 1991, the trial court entered a *pendente lite* order memorializing the agreement. By its terms, the court granted Moriarty custody of the children and granted the grandparents visitation on alternate

weekends from Thursday evening through Sunday evening. The court further ordered the grandparents to pick up and return the children to Moriarty's home in Linden, New Jersey. Bradt was initially denied visitation unless supervised by her parents. The trial court also appointed a mental health expert to conduct an examination of Moriarty, Bradt, and the children.

On April 15, 1993, after an eight-day trial, a dual final judgment of divorce was entered. Both Moriarty and Bradt had proven their claims of extreme cruelty and Moriarty had additionally proven that Bradt was an habitual drug user. As a result, Moriarty was granted sole custody of the children. Bradt was granted supervised visitation in the grandparents' presence, which was allowed to take place in Pennsylvania because the grandparents had agreed to submit to the jurisdiction of the Family Part on every aspect of the case; permitted one hour of telephone contact with the children on non-visitation days; ordered to continue psychiatric therapy; required to undergo random weekly drug testing with the results forwarded to Moriarty; ordered to abstain from non-prescription drug and alcohol use; and required to attend weekly meetings of Alcoholic Anonymous and other support groups. Moreover, Bradt and the grandparents were forbidden to have the children treated medically except in an emergency situation.

Both parties remarried in 1994. In August 1994, Bradt was granted unsupervised visitation, which took place in New Jersey. The grandparents saw the children during most weekends that Bradt had visitation. However, significant animosity developed between Moriarty and the grandparents. Moriarty claimed that he feared for his children's safety when they visited their grandparents alone. On one occasion while with the grandparents in the Poconos, Brian pulled a cup of hot chocolate down on himself, resulting in second- and third-degree burns to his face, neck, and chest. The grandparents took Brian to the local hospital for treatment and had a neighbor who was a pediatrician, Dr. Chen, make sure that he had been treated properly. After learning of the incident, when the grandparents returned the children Moriarty approached them in an aggressive manner. As a

result, the grandmother obtained a final restraining order against Moriarty.

On another occasion, Brian broke his leg while in the grandparents' care. In addition, Moriarty testified that the children were bruised and cut when they were returned from visitation, as well as sick and dirty. Moriarty also testified that the grandparents and Bradt took Brian for steroid treatments for stress-induced asthma for months without informing him. However, the grandparents' long-time friend testified that they had a warm, close relationship with the children and their son James testified that they exhibited good parenting skills.

Bradt died on November 8, 1999, apparently from an overdose of prescription pain medication and cold medicine. On hearing about Bradt's death, Moriarty testified that he contacted his family priest and a bereavement counselor to determine how to handle the situation in a way that would be in the children's best interests. According to Moriarty's testimony, the bereavement counselor advised that the children should attend Bradt's wake and that a bereavement ceremony at the children's church for their mother after her funeral was appropriate; however, the counselor advised that it would not be in the children's best interests to attend their mother's funeral. Moriarty relayed that information to the grandparents. In response, they moved on an emergency basis before the trial court to permit the children to attend their mother's funeral. The court granted the motion and ordered "regular and continual visitation with the grandparents."

On December 3, 1999, the grandparents filed an emergency application for holiday visitation with the children because Moriarty had refused their request. On December 16, 1999, the trial court held a hearing on the issue, resulting in a consent order granting holiday visitation with the children from December 26 to December 28, 1999, and thereafter, once every five weeks, consisting of two consecutive overnight visits until a plenary hearing on the merits could be held. Among other things, the court ordered diagnostic evaluations of Moriarty, the grandparents, the children, and Bradt's husband.

On January 26, 2000, a court-ordered probation investigation report was filed with the court, which noted that Moriarty insisted on supervised visitation because he believed that the grandparents were responsible for their daughter's psychiatric problems. Moriarty further told the evaluators that he feared that the grandparents could have a negative influence on the children.

Family Services completed the court-ordered diagnostic evaluations and the team filed its report. In that evaluation, the Family Services team noted that the grandmother had obtained a bachelor's degree in zoology, as well as a master's degree and a doctorate in biology. For approximately eighteen years, the grandmother was a professor and research scientist at Lehigh University. Since 1993, she had been employed at Muhlenberg College as a professor of environmental science. The grandfather graduated with a dual degree in mechanical and industrial engineering and had taken other courses, including business courses at Harvard. He founded a business that manufactured a type of conveyor belt based on technology that he had patented. He served as that company's chief executive officer for thirty years. In addition, the grandfather had worked as a business consultant and a teacher.

Moriarty's background is similarly impressive. He obtained a bachelor's degree in business and economics, as well as a master's degree in economics. He joined the Air Force and attended Flight School. He subsequently served several years in the Air Force Reserve. At the time of the report, Moriarty was employed as an executive vice-president and partner running a hedge fund. He and his wife have five children: two children from her previous marriage, his two children, and one child in common.

Based on its interviews, the team determined that the grandparents could "serve as a conduit with the children's deceased mother and can be a positive resource for the children in many ways." Accordingly, the report recommended unsupervised grandparent visitation once per month for two full days in New Jersey, while the grandparents stayed overnight in a hotel and the children slept at home. Moreover, the report recommended that

the grandparents attend the children's weekend activities; have regular telephone and email contact with them; have holiday visitation, so long as it did not interfere with the children's activities; and if no contraindications, visitation should progress to taking place once monthly at the grandparents' home, subject to the children's scheduled activities.

In June 2000, Moriarty filed a motion for summary judgment on the issue of grandparent visitation in light of the United States Supreme Court's ruling in *Troxel v. Granville*, 530 *U.S.* 57, 120 *S. Ct.* 2054, 147 *L. Ed.* 2d 49 (2000), that had invalidated the State of Washington's grandparent visitation statute on constitutional grounds because it infringed on fit parents' constitutional rights to rear their children. Moriarty then offered the following visitation schedule that he believed to be in the best interests of the children: the grandparents were allowed to visit one day each month during an activity or activities of either or both of the children, on either Saturday or Sunday, and for two hours after such activity for lunch or dinner. That schedule further provided that all visitation would occur in Bergen County and that the children would not be permitted to leave Bergen County at any time during the visitation. Moriarty agreed that by the fifth of each month, he would furnish the grandparents with the date, time, and place of the activity or activities that they would be invited to attend. In his certification in support of the motion, Moriarty reiterated that he was "not attempting to eliminate contact between [his] children and their maternal grandparents"; rather, he was seeking to establish a visitation schedule that he believed was in his children's best interests.

On June 28, 2000, the trial court adjourned Moriarty's summary judgment motion and granted additional summer visitation to the grandparents for five consecutive days in July 2000. Moriarty applied for a stay of that summer visitation order, which was denied. On August 7, 2000, the trial court heard additional oral argument on Moriarty's motion for summary judgment. Moriarty argued that *Troxel* factually was similar to his case and thus, the trial court was required to defer to his decision, as a fit parent, regarding grandparent visitation. The grandparents responded that Moriarty's visitation proposal was effectively no

visitation. In addition, although the grandparents conceded that a fit parent's decision regarding visitation is entitled to some deference, they argued that the New Jersey statute mandates a hearing to determine whether the proposed visitation is in the best interest of the children.

In denying the motion, the trial court noted the "extremely heavy burden" that the grandparents would have to carry under the ruling in *Troxel*. The trial court ordered a plenary hearing to afford the grandparents the opportunity to present expert testimony and their witnesses. At the hearing, the court noted that the grandparents had modified their request to once a month visitation, alternating between two overnights and daytime visits of five to six hours. Furthermore, the grandparents sought two weeks of extended visitation over the summer -- one week in July and one in August.

The hearing concluded on October 20, 2000, with the trial court reserving its decision. During the hearing, however, the court entered an order granting the grandparents overnight visitation with the children at their home in Easton, Pennsylvania for two nights on the weekend of October 6, 2000. On November 9, 2000, after detailed factual findings, the trial court rendered its decision and ordered grandparent visitation as follows: (1) monthly visitation alternating between a five-hour day visit one month and a visit with two overnights the next month and (2) one extended visitation period in July or August. The court specifically noted that the reason it ordered that visitation was its reliance on the grandparents' expert who opined that such visitation was "to protect the children from the harm that would befall them if they were alienated from their grandparents."

Moriarty appealed the trial court's order, primarily on the basis that New Jersey's statute is unconstitutional as applied in this case and accordingly, that the trial court abused its discretion in not abiding by the schedule that he had proposed. While that appeal was pending, Moriarty continued to make additional demands on the grandparents' visitation schedule ordered by the court. Those conditions included: taking the children to Roman Catholic mass; refraining from drinking any alcohol in the

children's presence; not leaving the children alone, separating them, or placing them with strangers; not leaving them alone with their Uncle George, "an admitted homosexual"; and if the children became ill or injured, returning them home immediately. The trial court granted the additional condition regarding emergency illnesses or injuries. With respect to church attendance, the grandparents obviated the need for a court ruling by agreeing to take the children to mass. The other conditions that Moriarty sought unilaterally to impose on the grandparents' visitation time with the children were denied.

In an unpublished opinion, the Appellate Division reversed the trial court and remanded for implementation of visitation as requested by Moriarty. The panel stressed that, "[w]e find no fault with the judge's factual findings[.]" Slip op. at 20. However, it noted that Moriarty's "substantive due process rights were violated by the imposition of the visitation ordered," in light of his alternative proffer. Slip op. at 19. In view of *Troxel*, the panel held that the decision of a fit parent to curtail grandparental visitation "cannot, under these facts, be subject to attack." Slip op. at 20. "[I]nterference with plaintiff's parental decision to afford the limited visitation offered was constitutionally impermissible." Slip op. at 21.

We granted the grandparents' petition for certification, 174 *N.J.* 189 (2002). We also granted *amici* status to the State of Jersey, the AARP, and the American Civil Liberties Union (ACLU). We now reverse.

II

The grandparents argue that the Grandparent Visitation Statute is constitutional; that a fit parent's decisions are entitled to deference, but are not absolute; and that the decision of the Appellate Division "eviscerates the grandparent visitation statute and thirty years of jurisprudence" supporting the rights of grandparents. The Attorney General and the AARP support those contentions.

Moriarty counters that the Appellate Division's decision is in accordance with *Troxel* and our prior case law and that the statute as applied is unconstitutional. The ACLU supports Moriarty and argues that the statute, as applied, violates due process by unconstitutionally infringing on the right of a fit parent to make decisions regarding his or her child's care and upbringing. More particularly, the ACLU urges us to hold that such parental decisions can be overridden only by clear and convincing evidence of demonstrable harm.

III

At common law, grandparents had no legal right to petition for visitation with their grandchildren. Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 *Fam. Ct. Rev.* 14, 15 (2003) (footnotes omitted); Ann M. Stanton, *Grandparents' Visitation Rights and Custody*, 7 *Child & Adolescent Psychiatric Clinics of N. Am.* 409, 411 (1998); Scott C. Boen, Note, *Grandparent Visitation Statutes: The Constitutionality of Court Ordered Grandparent Visitation Absent a Showing of Harm to the Child*, 20 *J. Juv. L.* 23, 28 (1999) (footnote omitted). In *Mimkon v. Ford*, we summarized five basic reasons for the historical denial of grandparent visitation:

> (1) Ordinarily the parent's obligation to allow the grandparent to visit the child is moral, and not legal.
>
> (2) The judicial enforcement of grandparent visitation rights would divide proper parental authority, thereby hindering it.
>
> (3) The best interests of the child are not furthered by forcing the child into the midst of a conflict of authority and ill feelings between the parent and grandparent.

> (4) Where there is a conflict as between grandparent and parent, the parent alone should be the judge, without having to account to anyone for the motives in denying the grandparent visitation.
>
> (5) The ties of nature are the only efficacious means of restoring normal family relations and not the coercive measures which follow judicial intervention.

[66 *N.J.* 426, 431 (1975) (quoting Duncan Gault, *Statutory Grandparent Visitation*, 5 *St. Mary's L.J.* 474, 480-81 (1973) (internal citations omitted)).]

That reasoning flowed from the social science research of the day. In fact, historically, there was practically no research regarding grandparents because most studies that related to family life were guided by emphasis on the "isolated nuclear family." Chrystal C. Ramirez Barranti, *The Grandparent/Grandchild Relationship: Family Resource in an Era of Voluntary Bonds*, 34 *Fam. Rel.* 343, 344 (1985). Even positing a role for grandparents was viewed as "antithetical to the norms of self-reliance and independence which were attributed to the nuclear family." *Ibid.* (citations omitted). Originally, those attitudes reflected the fact that longevity rates did not allow most grandparents to play a long-term role in their grandchildren's lives. *Id.* at 343.

Things began to change as grandparents lived longer and had more opportunity to forge a sustained and lengthy relationship with their grandchildren. *Ibid.* The rise in family breakups also played a part in reinvigorating the grandparents' role. *Id.* at 346; *see* Thomas E. Denham & Craig W. Smith, *The Influence of Grandparents on Grandchildren: A Review of the Literature and Resources*, 38 *Fam. Rel.* 345, 345 (1989) (noting that increased longevity rates and demographic changes, such as family disruption through divorce, alcoholism, and/or other social problems, "have opened the door to a new and growing emphasis on grandparenthood"). Against that setting, new explorations of the grandparents' role in American society were begun in the late 1950s through the 1970s. Ramirez Barranti, *supra*, 34 *Fam. Rel.* at

344. Additional initiatives were aimed at developing "typologies" of grandparenthood. *Ibid.*; *see also* Denham & Smith, *supra*, 38 *Fam. Rel.* at 347 (noting that typologies assist in characterizing "types of behavior" and "style of interaction" that take place). Many such typologies emerged, including but not limited to historian, mentor, role model, and nurturer. Ramirez Barranti, *supra*, 34 *Fam. Rel.* at 345 (citing Arthur Kornhaber, M.D. & Kenneth L. Woodward, *Grandparents/Grandchildren: The Vital Connection* (1981)).

Moreover, the importance of the grandparent-grandchild relationship in the lives of children has been confirmed. *See id.* at 346-47 (describing studies by Baranowski, Kornhaber and Woodward, and Mead in support of that contention).

> The emotional attachments between grandparents and grandchildren have been described as unique in that the relationship is exempt from the psycho-emotional intensity and responsibility that exists in parent/child relationships. The love, nurturance, and acceptance which grandchildren have found in the grandparent/grandchild relationship "confers a natural form of social immunity on children that they cannot get from any other person or institution."
>
> [*Id.* at 346 (citing Kornhaber & Woodward, *supra*, at xiii-xiv).]

Commentators have suggested that, "[i]n the absence of a grandparent/grandchild relationship, children experience a deprivation of nurturance, support, and emotional security." *Id.* at 346-47 (describing studies by Kornhaber and Woodward and Mead). Indeed, Kornhaber and Woodward posited that "'the complete emotional well-being of children requires that they have a direct, and not merely derived, link with their grandparents.'" *Id.* at 347 (quoting Kornhaber & Woodward, *supra*, at 163). Mead advanced the notion that "when an individual does not have intergenerational family relationships there is a resulting lack of cultural and historical sense of self." *Ibid.*

To be sure, those broad conclusions would not necessarily apply to a grandparent with an emotional disorder or serious character or behavioral flaws or to one who placed the child in danger or sought to subvert the relationship of the child to his parents. *See, e.g.*, *King v. King*, 828 *S.W.*2d 630, 632 (Ky.) (noting that children "ordinarily benefit" from contact with grandparents that are "physically, mentally, and morally fit"), *cert. denied*, 506 *U.S.* 941, 113 *S. Ct.* 378, 121 *L. Ed.* 2d 289 (1992); Stanton, *supra*, 7 *Child & Adolescent Psychiatric Clinics of N. Am.* at 410 (noting that grandparents who interfere with childrearing and parental discipline can negatively affect family relationships). Grandparents, like every other group of humans in society, are not monolithic. They range across the spectrum from wholesome nurturers to bad influences. *See* Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 *Conn. L. Rev.* 1315, 1324-31 (1994) (noting that psycho-social research indicates that not all grandparent/grandchild relationships are beneficial to grandchildren; rather, many grandparent/grandchild relationships merely provide grandchildren with ephemeral benefits). Thus, although as a general proposition the grandparents' role in a child's life may be very important, each case in which grandparents are pitted against parents over visitation with grandchildren must stand or fall on its own facts. *See Troxel*, *supra*, 530 *U.S.* at 73, 120 *S. Ct.* at 2064, 147 *L. Ed.* 2d at 61 (observing that "much state-court adjudication" regarding grandparent visitation "occurs on a case-by-case basis"). That is the backdrop on which our Grandparent Visitation Statute was enacted.

IV

In 1972, New Jersey, replicating what would eventually take place in all fifty states,[1] enacted the Grandparent Visitation Statute. *N.J.S.A.* 9:2-7.1 (*L.* 1971, *c.* 420, § 1, effective Feb. 1,

[1] *See Troxel*, *supra*, 530 *U.S.* at 73-74 n.*, 120 *S. Ct.* at 2064 n.*, 147 *L. Ed.* 2d at 61 n.* (setting forth grandparent visitation statutes in all fifty states); Maegen E. Peek, Note, *Grandparent Visitation Statutes: Do Legislatures Know the Way to Carry the Sleigh Through the Wide and Drifting Law?*, 53 *Fla. L. Rev.* 321, 326 n.30 (2001) (citing same).

1972). That statute, as amended in 1973, afforded standing to grandparents to seek visitation when "either or both of the parents of a minor child . . . is or are deceased, or divorced or living separate and apart in different habitats . . . ." *N.J.S.A.* 9:2-7.1 (as amended by *L.* 1973, *c.* 100, § 1). The statute was amended in 1987 to allow siblings to apply for visitation with the child. *N.J.S.A.* 9:2-7.1 (as amended by *L.* 1987, *c.* 363, § 2). Thus, prior to 1993, "intact families" (those not disrupted by death or divorce) were not subject to statutory visitation rights of grandparents.

In 1993, *N.J.S.A.* 9:2-7.1, was amended to provide:

> a. A grandparent or any sibling of a child residing in this State may make application before the Superior Court, in accordance with the Rules of Court, for an order for visitation. It shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child.
>
> b. In making a determination on an application filed pursuant to this section, the court shall consider the following factors:
>
> (1) The relationship between the child and the applicant;
>
> (2) The relationship between each of the child's parents or the person with whom the child is residing and the applicant;
>
> (3) The time which has elapsed since the child last had contact with the applicant;
>
> (4) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;

(5) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child;

(6) The good faith of the applicant in filing the application;

(7) Any history of physical, emotional or sexual abuse or neglect by the applicant; and

(8) Any other factor relevant to the best interests of the child.

c. With regard to any application made pursuant to this section, it shall be prima facie evidence that visitation is in the child's best interest if the applicant had, in the past, been a full-time caretaker for the child.

[*N.J.S.A.* 9:2-7.1 (as amended by *L.* 1993, *c.* 161, § 1 (effective June 29, 1993)).]

The effect of the new statute was to expand the scope of grandparents' visitation rights and to remove the requirement that the parents be deceased or divorced. The Act became effective June 29, 1993.

We detailed the legislative history of the latest version of the Act in *In re Adoption of a Child by W.P. & M.P.*:

> On May 20, 1993, the General Assembly gave final approval to the Grandparent Visitation Statute. The bill was signed into law by Governor Florio on June 29, 1993, and became effective that same day. As previously stated, the new law eliminated the requirement that a child's parents be deceased, divorced or separated in order for a grandparent to apply for visitation rights. Instead, the statute provides that "a grandparent or any sibling of a child residing in this State" may apply

> for visitation, and it instructs the Superior Court to consider eight enumerated factors when determining whether the grant of such visitation is in the best interests of the child.
>
> In its original form, the bill did not enumerate factors, requiring only that visitation be in the best interests of the child, with no guidance to the courts. In an apparent response to concerns that it constituted "a gross invasion of the sanctity and privacy of the family unit," the bill was amended, setting forth the eight factors as a way of limiting the intrusive elements of the act. *See* Letter from Cary B. Cheifetz, Esq., Skoloff & Wolfe, to Gov. Jim Florio (Dec. 22, 1992) (enclosing proposed bill setting forth specific criteria that protect child's best interests).
>
> A precursor to the current statute Assembly Bill No. 1475 was prefiled for introduction in the 1990 session. That version expressly required that the court consider the objections of a parent to an application for visitation by that parent's parent (i.e., the child's grandparent). *See* Assembly Bill No. 1475, Prefiled for Introduction in the 1990 Session. According to the bill statement accompanying Bill No. 1475, the purpose of that provision was to "ensure that the court does not grant visitation to a parent's own blood relatives without considering whether the parent may object to such visitation." *Id.* at 2 (emphasis [omitted]). Although that provision was not enacted in the final bill, it suggests that the Legislature believed that parental autonomy should be afforded deference.
>
> [163 *N.J.* 158, 165-66 (2000).]

In essence, our statute has undergone transformation over the years, and grants standing to grandparents and siblings to seek

visitation with a child. Its structure underscores the fact-sensitive nature of the inquiry by detailing seven particularized considerations for the court and instructing the court to consider as well, "any other factor" relevant to the child's best interests.

The Grandparent Visitation Statute, like all others, is presumed to be constitutional — "a presumption that may be rebutted only on a showing that a provision of the Constitution is clearly violated by the statute." *In re Adoption of a Child by W.P.*, *supra*, 163 *N.J.* at 192 (Poritz, C.J., dissenting) (citing *Board of Educ. v. Caffiero*, 86 *N.J.* 308, 318, *appeal dismissed*, 454 *U.S.* 1025, 102 *S. Ct.* 560, 70 *L. Ed.* 2d 470 (1981)).

V

The right to rear one's children is so deeply embedded in our history and culture that it has been identified as a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Wisconsin v. Yoder*, 406 *U.S.* 205, 232-33, 92 *S. Ct.* 1526, 1541-42, 32 *L. Ed.* 2d 15, 35 (1972) (explaining "primary role" of parents in raising their children as "an enduring American tradition" and the Court's historical recognition of that right as fundamental). Although often expressed as a liberty interest, childrearing autonomy is rooted in the right to privacy. *See Prince v. Massachusetts*, 321 *U.S.* 158, 166, 64 *S. Ct.* 438, 442, 88 *L. Ed.* 645, 652 (1944) (observing existence of "private realm of family life which the state cannot enter"); *V.C. v. M.J.B.*, 163 *N.J.* 200, 218 (remarking that "the right of a legal parent to the care and custody of his or her child derives from the notion of privacy"), *cert. denied*, 531 *U.S.* 926, 121 *S. Ct.* 302, 148 *L. Ed.* 2d 243 (2000). Eighty years ago in *Meyer v. Nebraska*, the United States Supreme Court characterized the right of parents to bring up their children "as essential to the orderly pursuit of happiness by free men." 262 *U.S.* 390, 399, 43 *S. Ct.* 625, 626, 67 *L. Ed.* 1042, 1045 (1923) (citations omitted).

In *Prince*, the Court elaborated on that right, declaring that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and

freedom include preparation for obligations the state can neither supply nor hinder." 321 *U.S.* at 166, 64 *S. Ct.* at 442, 88 *L. Ed.* at 652 (citation omitted). The Court further stated, "[I]t is in recognition of this [right] that [*Pierce v. Society of Sisters*, 268 *U.S.* 510, 45 *S. Ct.* 571, 69 *L. Ed.* 1070 (1925) and *Meyer*, *supra*, 262 *U.S.* 390, 43 *S. Ct.* 625, 67 *L. Ed.* 1042,] have respected the private realm of family life which the state cannot enter." *Prince*, *supra*, 321 *U.S.* at 166, 64 *S. Ct.* at 442, 88 *L. Ed.* at 652. In *Yoder*, the Court recognized that a child is not a "'mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.'" 406 *U.S.* at 233, 92 *S. Ct.* at 1542, 32 *L. Ed.* 2d at 35 (quoting *Pierce*, *supra*, 268 *U.S.* at 534-35, 45 *S. Ct.* at 573, 69 *L. Ed.* at 1078). The Court observed that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Yoder*, *supra*, 406 *U.S.* at 232, 92 *S. Ct.* at 1541-42, 32 *L. Ed.* 2d at 35; *see also Stanley v. Illinois*, 405 *U.S.* 645, 651, 92 *S. Ct.* 1208, 1212, 31 *L. Ed.* 2d 551, 558 (1972) (noting constitutional protection of parent's interest in "companionship, care, custody, and management of his or her children"); *Pierce*, *supra*, 268 *U.S.* at 534-35, 45 *S. Ct.* at 573, 69 *L. Ed.* at 1078 (noting parents' and guardians' liberty interest "to direct the upbringing and education of children under their control"). We have recognized unfailingly that deeply embedded right in our jurisprudence as well. *Watkins v. Nelson*, 163 *N.J.* 235, 245 (2000); *V.C.*, *supra*, 163 *N.J.* at 217-18; *In re Guardianship of K.H.O.*, 161 *N.J.* 337, 346 (1999).

To be sure, the constitutional imperative of preserving familial integrity is not absolute. *Yoder*, *supra*, 406 *U.S.* at 233-34, 92 *S. Ct.* at 1542, 32 *L. Ed.* 2d at 35; *Prince*, *supra*, 321 *U.S.* at 166, 64 *S. Ct.* at 442, 88 *L. Ed.* at 652; *V.C.*, *supra*, 163 *N.J.* at 218. Situations have arisen requiring a state to exercise its *parens patriae* authority to guard children from harm. *See Prince*, *supra*, 321 *U.S.* at 166-67, 64 *S. Ct.* at 442, 88 *L. Ed.* at 652 (recognizing when circumstances place child in imminent danger, or affect his well-being, state could properly intrude on that "private realm of family life" to protect child from harm). Thus, for example, our courts have overridden the desires of parents who refused to consent to medical treatment and ordered such treatment to save a

child's life. *See Parham v. J.R.*, 442 *U.S.* 584, 603, 99 *S. Ct.* 2493, 2504, 61 *L. Ed.* 2d 101, 119 (1979) ("Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." (citations omitted)); *Prince*, *supra*, 321 *U.S.* at 166-67, 64 *S. Ct.* at 442, 88 *L. Ed.* at 652-53 (noting that state, as *parens patriae*, can intrude on parental autonomy to protect child from ill health or death); *Jehovah's Witnesses v. King County Hosp. Unit No. 1*, 278 *F. Supp.* 488, 498-99, 504-05 (W.D. Wash. 1967) (holding Washington State statute that declared children to be dependents of state for purpose of authorizing blood transfusions against expressed wishes of parents was constitutional), *aff'd*, 390 *U.S.* 598, 88 *S. Ct.* 1260, 20 *L. Ed.* 2d 158 (1968) (per curiam); *State v. Perricone*, 37 *N.J.* 463, 474 (finding state may act under its *parens patriae* authority to protect child's welfare by declaring him or her neglected to obtain necessary medical treatment), *cert. denied*, 371 *U.S.* 890, 83 *S. Ct.* 189, 9 *L. Ed.* 2d 124 (1962); *Muhlenberg Hosp. v. Patterson*, 128 *N.J. Super.* 498, 503 (Law Div. 1974) (ordering blood transfusion to infant over parents' wishes).

Summing up, when the State seeks, by statute, to interfere with family and parental autonomy, a fundamental right is at issue. That statute thus is subject to strict scrutiny and will only pass muster if it is narrowly tailored to serve a compelling state interest. *Washington v. Glucksberg*, 521 *U.S.* 702, 720-21, 117 *S. Ct.* 2258, 2268, 138 *L. Ed.* 2d 772, 787-88 (1997); *Roe v. Wade*, 410 *U.S.* 113, 155-56, 93 *S. Ct.* 705, 728, 35 *L. Ed.* 2d 147, 178 (1973) (citations omitted); *Brown v. City of Newark*, 113 *N.J.* 565, 573 (1989) (citations omitted); *see also Roth v. Weston*, 789 *A.*2d 431, 441-42 (Conn. 2002) (noting that strict scrutiny is required where fundamental right of parents to care, custody, and control of their children is implicated and that statutory scheme infringing on same must be narrowly tailored "so that a person's personal affairs are not needlessly intruded upon and interrupted by the trauma of litigation" (citation omitted)); *Lulay v. Lulay*, 739 *N.E.*2d 521, 532 (Ill. 2000) (holding that because Illinois grandparent visitation statute infringes on fundamental right of parents to upbringing of their children, state must prove that statute serves compelling state interest and is narrowly tailored to serve that compelling interest);

Rideout v. Riendeau, 761 *A.*2d 291, 299-300 (Me. 2000) (explaining that "heightened protection against state intervention in parents' fundamental right to make decisions concerning the care, custody, and control of their children" requires "strict scrutiny of the statute at issue" (citations omitted)); *Blixt v. Blixt*, 774 *N.E.*2d 1052, 1059 (Mass. 2002) (observing that strict scrutiny requires compelling state interest to justify state action and "careful examination to ascertain whether the action taken was 'narrowly tailored to further [that] interest'" (quotation omitted)), *cert. denied*, ___ *U.S.* ___, 123 *S. Ct.* 1259, 154 *L. Ed.* 2d 1022 (2003); *Hoff v. Berg*, 595 *N.W.*2d 285, 290-91 (N.D. 1999) (applying strict scrutiny and noting that "'the idea of strict scrutiny acknowledges that [ ] political choices . . . burdening fundamental rights . . . must be subjected to close analysis in order to preserve substantive values of equality and liberty.'" (quoting Laurence H. Tribe, *American Constitutional Law* § 16-6 at 1451 (2d ed. 1988))).

VI

On that backdrop, we turn to the United States Supreme Court's recent decision in *Troxel*. There, the Court addressed the constitutionality of the Washington State nonparental visitation statute, *Wash. Rev. Code* § 26.10.160(3) (1994), that provided: "'Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.'" *Troxel*, *supra*, 530 *U.S.* at 61, 120 *S. Ct.* at 2057-58, 147 *L. Ed.* 2d at 54. The grandparents in *Troxel*, whose son had committed suicide, initially sought two weekends of overnight visitation per month, as well as two weeks of visitation each summer with their grandchildren with whom they had a long-standing pre-existing relationship. *Id.* at 60-61, 120 *S. Ct.* at 2058, 147 *L. Ed.* 2d at 53-54. The mother did not oppose visitation; rather, she sought to limit that visitation to one day per month without an overnight stay. *Id.* at 61, 120 *S. Ct.* at 2058, 147 *L. Ed.* 2d at 54.

After a trial, the trial court ruled in favor of the grandparents because "'it is normally in the best interest of the

children to spend quality time with the grandparent.'" *Id.* at 69, 120 *S. Ct.* at 2062, 147 *L. Ed.* 2d at 59 (quotation omitted). The court ordered visitation one weekend per month, one week during the summer, and four hours on each of the grandparents' birthdays. *Id.* at 61, 120 *S. Ct.* at 2058, 147 *L. Ed.* 2d at 54 (citations omitted). It stated:

> The [grandparents] are part of a large, central, loving family, all located in this area, and the [grandparents] can provide opportunities for the children in the areas of cousins and music. . . . The children would be benefitted from spending quality time with the [grandparents], provided that that time is balanced with time with the children['s] nuclear family.
>
> [*Id.* at 61-62, 120 *S. Ct.* at 2058, 147 *L. Ed.* 2d at 54 (quotation omitted).]

The Washington Court of Appeals reversed and dismissed the grandparents' petition on the basis that "nonparents lack standing to seek visitation under § 26.10.160(3) unless a custody action is pending." *Id.* at 62, 120 *S. Ct.* at 2058, 147 *L. Ed.* 2d at 54. The grandparents appealed, and the Washington Supreme Court affirmed. *Id.* at 62-63, 120 *S. Ct.* at 2058, 147 *L. Ed.* 2d at 55. The court found that the grandparents had standing based on the unambiguous language of § 26.10.160(3) but affirmed the appellate court's ultimate ruling that the grandparents were not entitled to visitation under the statute because the statute impermissibly interfered with the fundamental right of parents to rear their children. *Id.* at 62-63, 120 *S. Ct.* at 2058, 147 *L. Ed.* 2d at 55. Clearly underpinning the court's decision was its conviction that the best interest standard articulated in the statute was insufficient to serve as a compelling state interest. *See id.* at 63, 120 *S. Ct.* at 2058, 147 *L. Ed.* 2d at 55 (noting that Washington Supreme Court observed that state only has compelling interest warranting interference with parental autonomy to protect child from harm or potential harm).

The United States Supreme Court, in a plurality opinion authored by Justice O'Connor, reaffirmed that the parental right to raise children is guaranteed by the Due Process Clause of the Fourteenth Amendment and held that the Washington statute impermissibly intruded on the mother's rights. *Id.* at 65-67, 120 *S. Ct.* at 2059-61, 147 *L. Ed.* 2d at 56-58. First, the Court focused on the "breathtakingly broad" nature of the Washington statute because it permitted any person, at any time, to petition a court for visitation and permitted a court to decide that visitation was in a child's best interest. *Id.* at 67, 120 *S. Ct.* at 2061, 147 *L. Ed.* 2d at 57. Second, the Court observed that the statute failed to accord any special weight to a parent's decision regarding visitation. *Id.* at 67, 120 *S. Ct.* at 2061, 147 *L. Ed.* 2d at 57. "Thus, in practical effect, . . . a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests." *Id.* at 67, 120 *S. Ct.* at 2061, 147 *L. Ed.* 2d at 57-58 (emphasis in original).

Third, the Court noted that no party had alleged that the mother was an unfit parent. *Id.* at 68, 120 *S. Ct.* at 2061, 147 *L. Ed.* 2d at 58. As such, the presumption that a fit parent acts in the best interests of his or her child was turned on its head by effectively assuming a presumption in favor of visitation and placing the burden of disproving visitation on the mother, a fit parent. *Id.* at 69, 120 *S. Ct.* at 2062, 147 *L. Ed.* 2d at 58.

Finally, the Court noted that there was no allegation that the mother sought to discontinue visitation between the grandparents and her children; rather, she sought to limit that visitation to an amount that she believed was in her daughters' best interest. *Id.* at 71, 120 *S. Ct.* at 2062-63, 147 *L. Ed.* 2d at 60. Given that combination of factors, in conjunction with the Washington trial court's "slender findings," the Court held that § 26.10.160(3) as applied to the mother was unconstitutional. *Id.* at 72, 120 *S. Ct.* at 2063-64, 147 *L. Ed.* 2d at 60-61.

The Court avoided the basic issue of the appropriate level of scrutiny and the standard to be applied. It also stopped short of invalidating nonparental visitation statutes *per se* and declined to

define "the precise scope of the parental due process right in the visitation context" because "the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied" as "much state-court adjudication in this context occurs on a case-by-case basis." *Id.* at 73-74, 120 *S. Ct.* at 2064, 147 *L. Ed.* 2d at 61-62 (citations omitted). Consequently, the Court did not rule on whether a showing of harm or potential harm to a child is required as a condition precedent to ordering visitation. *Id.* at 73, 120 *S. Ct.* at 2064, 147 *L. Ed.* 2d at 61.

Justice Souter concurred in the judgment but would have affirmed the decision of the Washington Supreme Court, which invalidated § 26.10.160(3) on its face because of the overbroad statutory language. *Id.* at 75-77, 120 *S. Ct.* at 2065-66, 147 *L. Ed.* 2d at 62-64 (Souter, J., concurring in judgment). Justice Thomas authored a brief opinion concurring in the judgment, wherein he noted that the Court failed to articulate the "appropriate standard of review." *Id.* at 80, 120 *S. Ct.* at 2068, 147 *L. Ed.* 2d at 65 (Thomas, J., concurring in judgment). Justice Thomas would have applied strict scrutiny because a fundamental right was implicated and would have invalidated the statute because of its inability to pass that level of scrutiny. *Id.* at 80, 120 *S. Ct.* at 2068, 147 *L. Ed.* 2d at 65 (Thomas, J., concurring in judgment).[2]

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[2] Justices Stevens, Scalia, and Kennedy each dissented on different grounds. Justice Stevens specifically rejected the requirement of a threshold showing of actual or potential harm to the child before nonparental visitation is permissible. *Id.* at 85-86, 120 *S. Ct.* at 2070-71, 147 *L. Ed.* 2d at 68-69 (Stevens, J., dissenting). He instead invoked a balancing approach, weighing all of the interests at stake in any given case. *Id.* at 88-89, 120 *S. Ct.* at 2072, 147 *L. Ed.* 2d at 70 (Stevens, J., dissenting). Justice Scalia would have reversed. *Id.* at 93, 120 *S. Ct.* at 2075, 147 *L. Ed.* 2d at 73 (Scalia, J., dissenting). In his opinion, state legislatures are the prime determiners of family law principles. *Id.* at 93, 120 *S. Ct.* at 2074-75, 147 *L. Ed.* 2d at 73 (Scalia, J., dissenting). He further questioned the validity of any substantive due process right to parent a child. *Id.* at 92, 120 *S. Ct.* at 2074, 147 *L. Ed.* 2d at 72-73 (Scalia, J., dissenting). Justice Kennedy agreed that parents have a Fourteenth Amendment right to parent their children without undue state interference, *id.* at 95, 120 *S. Ct.* at 2076, 147 *L. Ed.* 2d at 74-75 (Kennedy, J., dissenting), but argued that the Constitution does not foreclose application of the best interests of the child standard in any

The Supreme Court of Arkansas recently reduced the holding in *Troxel* to its basic elements. *Linder v. Linder*, 72 *S.W.*3d 841, 852-55 (Ark. 2002). We agree with that analysis:

> To summarize, six Justices agreed that the case should be affirmed (O'Connor, Rehnquist, Ginsburg, Breyer, Souter, and Thomas). Eight Justices agreed that the Fourteenth Amendment protects a parent's right to raise his or her child without undue interference from government (all but Scalia; Thomas with reservations). Five Justices agreed that a fit parent is accorded a presumption that the parent acts in the child's best interests (O'Connor, Rehnquist, Ginsburg, Breyer, and Stevens). Four Justices (O'Connor, Rehnquist, Ginsburg, and Breyer) agreed that "special factors" must "justify" the state's intrusion, and that one of those factors is a finding of parental unfitness.
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> [*Id.* at 855.]

In sum, although eschewing the articulation of the level of scrutiny and the standard to be applied to a grandparent visitation statute, *Troxel* instructs at least this much -- that a fit parent has a fundamental due process right to the care and nurturance of his or her children; that that right is protected where a nonparental visitation statute respects a fit parent's decision regarding visitation by (1) according him or her the "traditional presumption" that a fit parent acts in the best interests of the child; and (2) giving "special weight" to a fit parent's determination regarding visitation. *Troxel*, *supra*, 530 *U.S.* at 66, 69, 120 *S. Ct.* at 2060, 2062, 147 *L. Ed.* 2d at 57-59. Other salient factors mentioned in *Troxel* include: the breadth of a statute's standing requirement, *id.* at 67, 120 *S. Ct.* at 2061, 147 *L. Ed.* 2d at 57; whether harm or potential harm is required before a court may order visitation, *id.* at 73, 120 *S. Ct.* at 2064, 147 *L. Ed.* 2d at 61; the denial of visitation in its entirety, *id.* at 71, 120 *S. Ct.* at 2062-63, 147 *L. Ed.* 2d at 60; and whether the

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visitation proceeding, *id.* at 98-99, 120 *S. Ct.* at 2077-78, 147 *L. Ed.* 2d at 76-77 (Kennedy, J., dissenting).

statute requires more than a simple best interest analysis, *id.* at 67, 120 *S. Ct.* at 2061, 147 *L. Ed.* 2d at 57-58. Many state courts have decoded *Troxel*'s elliptical message in similar fashion. *See, e.g.*, *Roth*, *supra*, 789 *A.*2d at 439 (concluding that *Troxel* plurality found that Washington statute was unconstitutional as applied because trial court made no finding of unfitness; trial court failed to accord any weight to mother's determination of her children's best interests; and no allegation was made that visitation was cut off completely); *Rideout*, *supra*, 761 *A.*2d at 297 (determining that *Troxel* provided some "guidance on important points," including that parents have fundamental right to care, custody, and control of their children, which does not give way to third party's petition for visitation; best interests standard, without more, is insufficient for state to interfere with parental decision making; and special weight must be given to parents' decisions because of presumption that he or she acts in child's best interest); *Blixt*, *supra*, 774 *N.E.*2d at 1058-59 (construing *Troxel* to provide following guideposts: reaffirmation of parent's liberty interest in raising his or her child is fundamental right; any person should not be granted standing to seek visitation; presumption exists that parents act in child's best interest, which warrants significant deference; and potential impact of grandparent visitation on parent-child relationship should be considered in trial court's analysis).

VII

Courts across the country have wrestled with the issue of grandparent visitation both before and after *Troxel*. In general, they have engaged in one of two modes of analysis: (1) interpreting the statutes to require satisfaction of a harm standard in order to overcome the presumption in favor of a fit parent's decision or (2) avoiding the articulation of any standard at all and analyzing the statutes on a case-by-case basis. *Troxel* implied that either approach would be acceptable. Roberts, *supra*, 41 *Fam. Ct. Rev.* at 22 (footnotes omitted).

Courts in the former category have undertaken traditional strict scrutiny review. That review routinely focuses on whether a compelling state interest warrants state intrusion into family life. Because parental autonomy is a fundamental right, the majority of

those courts have rejected any compelling interest short of harm to the health or welfare of a child. As such, those courts have required a threshold showing of harm prior to utilizing a best interests analysis to protect parental rights. *See, e.g.*, *Brooks v. Parkerson*, 454 *S.E.*2d 769, 773 n.5 (Ga.) ("[T]he 'best interest of the child' standard does not come into play to permit interference with the custody and control of the child, over parental objection, unless and until there is a showing of *harm* to the child without that interference."), *cert. denied*, 516 *U.S.* 942, 116 *S. Ct.* 377, 133 *L. Ed.* 2d 301 (1995); *In re Herbst*, 971 *P.*2d 395, 399 (Okla. 1998) ("To reach the issue of a child's best interests, there must be a requisite showing of harm, or threat of harm . . . . Absent a showing of harm, (or threat thereof) it is not for the state to choose which associations a family must maintain and which the family is permitted to abandon."); *Hawk v. Hawk*, 855 *S.W.*2d 573, 580 (Tenn. 1993) (requiring "an initial showing of harm . . . before the state may intervene to determine the 'best interests of the child'"); *Williams v. Williams*, 501 *S.E.*2d 417, 418 (Va. 1998) ("'[B]efore visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation. A court reaches consideration of the "best interests" standard in determining visitation only after it finds harm if visitation is not ordered.'" (quotations omitted)); *but see, e.g.*, *Rideout*, *supra*, 761 *A.*2d at 300-01 (applying strict scrutiny standard of review and rejecting harm as only permissible compelling state interest but noting that that interest requires "something more than the best interest of the child" (footnote omitted)); *Michael v. Hertzler*, 900 *P.*2d 1144, 1147, 1151 (Wyo. 1995) (conducting strict scrutiny review but finding that because right to associate with one's family is fundamental right of parents, children, and grandparents, court found that best interests balancing test was sufficient to weigh those interests).

Courts in the latter category have simply compared the structure of their statutes to the one invalidated in *Troxel* to assess constitutionality. *See, e.g.*, *Jackson v. Tangreen*, 18 *P.*3d 100 (Ariz. Ct. App. 2000) (determining that *Troxel* had no bearing on Arizona's grandparent visitation statute because that statute was more narrowly drawn than Washington statute in *Troxel*), *cert. denied*, 534 *U.S.* 953, 122 *S. Ct.* 351, 151 *L. Ed.* 2d 265 (2001);

Lopez v. Martinez, 102 *Cal. Rptr.* 2d 71 (Cal. Ct. App. 2000) (finding that California grandparent visitation statute was "not affected" by *Troxel* because statute was more narrowly drawn than Washington statute); *Galjour v. Harris*, 795 *So.* 2d 350 (La. Ct. App.) (holding Louisiana grandparent visitation statute constitutional because it was more limited than Washington statute in *Troxel*), *writ denied*, 793 *So.* 2d 1229, 1230 (La.), *cert. denied*, 534 *U.S.* 1020, 122 *S. Ct.* 545, 151 *L. Ed.* 2d 422 (2001); *Blakely v. Blakely*, 83 *S.W.*3d 537 (Mo. 2002) (en banc) (finding Missouri grandparent visitation statute constitutional because statute avoids Washington statute's "sweeping breadth" in several respects); *State ex rel. Brandon L. v. Moats*, 551 *S.E.*2d 674 (W. Va. 2001) (holding West Virginia grandparent visitation constitutional because it is much narrower than the Washington statute in *Troxel*). Although such an approach necessarily precludes clear categorization, the leitmotif that runs through those cases is that the best interests standard standing alone, will not survive a constitutional challenge, although what more is needed is left unspoken. *See* Roberts, *supra*, 41 *Fam. Ct. Rev.* at 26-27 (stating that post-*Troxel* decisions have recognized that best interests standard alone, without some deference to parents, does not adequately protect parental autonomy); *Developments in the Law -- The Law of Marriage and Family -- Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 *Harv. L. Rev.* 2052, 2059 (2003) (noting that *Troxel* demands "something more" than best interests standard to safeguard parental autonomy). Those courts essentially accept *Troxel*'s instruction that best interests is insufficient to intrude on parental autonomy. *See Troxel*, *supra*, 530 *U.S.* at 67-68, 120 *S. Ct.* at 2061, 147 *L. Ed.* 2d at 57-58 (explaining that trial court cannot overrule fit parent's decision "based solely on the judge's determination of the child's best interests").

VIII

Unlike our sister states, many of which felt compelled to develop a new and constitutionally appropriate standard for grandparent visitation, we have, as recently as 2000, confronted the issue in a cognate setting. In *Watkins v. Nelson*, 163 *N.J.* 235

(2000), we were faced with a struggle between the grandparents and a natural father over the custody of a nineteen-month-old child. The grandparents' daughter, who was the child's mother and custodial parent, had died. The Appellate Division, applying a best interests standard, ruled in favor of the grandparents. We reversed, based on our conclusion that the application of that standard violated the fundamental right of the father to family autonomy. In so ruling, Justice Coleman, speaking for the Court, reiterated that

> the right of natural parents to the custody, care and nurturing of their children has risen to the stature of a fundamental right and deserves special protection. *Santosky v. Kramer*, 455 *U.S.* 745, 753, 102 *S. Ct.* 1388, 1394, 71 *L. Ed.* 2d 599 (1982); *Stanley v. Illinois*, 405 *U.S.* 645, 651-652, 92 *S. Ct.* 1208, 1212-1213, 31 *L. Ed.* 2d 551 (1972) (and cases cited); *In re Guardianship of Dotson*, 72 *N.J.* 112, 122, 367 *A.*2d 1160 (1976) (Pashman, J., concurring); *State v. Perricone*, 37 *N.J.* 463, 472, 181 *A.*2d 751 (1962), *cert. den[ied]*, 371 *U.S.* 890, 83 *S. Ct.* 189, 9 *L. Ed.* 2d 124 (1962). *See In re N.*, 96 *N.J. Super.* 415, 424-425 n.5, 233 *A.*2d 188 (App. Div. 1967).
>
> [*Watkins*, *supra*, 163 *N.J.* at 245 (quoting *In re D.T.*, 200 *N.J. Super.* 171, 176-77 (App. Div. 1985)).]

In setting forth an appropriate standard, he stated:

> Since the right of parents to the custody of their minor children is both a natural and legal right, the law should not disturb the parent/child relationship except for the strongest reasons and only upon a clear showing of a parent's gross misconduct or unfitness or of other extraordinary circumstances affecting the welfare of the child. *See* 59 [*Am. Jur. 2d] Parent and Child*, § 25 at 107-108 (1971).

[*Watkins*, *supra*, 163 *N.J.* at 245 (quoting *In re D.T.*, *supra*, 200 *N.J. Super.* at 176-77).]

Justice Coleman went on to characterize that standard as deeply rooted in our jurisprudence:

> Not surprisingly, the concept that a presumption of custody exists in favor of a parent, and that only a showing of unfitness, abandonment, gross misconduct, or "exceptional circumstances" will overcome this presumption, is steeped in the history and common law of this State. *See, e.g.*, *In re D.T.*, *supra*, 200 *N.J. Super.* at 175-76, 491 *A.*2d 7; *E.T. v. L.P.*, 185 *N.J. Super.* 77, 84, 447 A.2d 572 (App. Div. 1982); *S. v. H.M. & E.M.*, 111 *N.J. Super.* 553, 558-59, 270 *A.*2d 48 (App. Div. 1970); *Kridel v. Kridel*, 85 *N.J. Super.* 478, 489, 205 *A.*2d 316 (App. Div. 1964); *In re Mrs. M.*, 74 *N.J. Super.* 178, 183-84, 186, 181 *A.*2d 14 (App. Div. 1962); *In re Adoption of B. by E. & R.*, 152 *N.J. Super.* 546, 551, 378 *A.*2d 90 (Union County Ct. 1977); *Jacobson v. Jacobson*, 146 *N.J. Super.* 491, 497, 370 *A.*2d 65 (Ch. Div. 1976); *Ex parte Alsdorf*, 142 *N.J. Eq.* 246, 252-53, 59 *A.*2d 610 (Ch. 1948); *Gardner v. Hall*, 132 *N.J. Eq.* 64, 78, 26 *A.*2d 799 (Ch. 1942), *aff'd*[,] 133 *N.J. Eq.* 287, 31 *A.*2d 805 (E. & A. 1943); *Pope v. Brown*, 3 *N.J. Misc.* 572, 572-73, 128 *A.* 851 (Ch. 1925); *Hesselman v. Haas*, 71 *N.J. Eq.* 689, 694, 64 *A.* 165 (Ch. 1906).
>
> [*Watkins*, *supra*, 163 *N.J.* at 246.]

He explained:

> The principle that a showing of gross misconduct, unfitness, neglect, or "exceptional circumstances" affecting the welfare of the child will overcome this presumption, is a recognition that a parent's right to custody is not absolute. That parental

> right must, at times, give way to the State's *parens patriae* obligation to ensure that children will be properly protected from serious physical or psychological harm. *In re Guardianship of K.H.O.*, 161 *N.J.* 337, 347, 736 *A.*2d 1246 (1999); *In re Guardianship of J.C.*, 129 *N.J.* 1, 10, 608 *A.*2d 1312 (1992). This has been our law for more than a century. As early as 1889, the highest Court in this State allowed the presumption in favor of a natural parent to be overcome by a showing of "exceptional circumstances." *Richards v. Collins*, 45 *N.J. Eq.* 283, 17 *A.* 831 (E. & A. 1889). More recently, in *Sorentino v. Family & Children's Soc. of Elizabeth*, 72 *N.J.* 127, 131-132, 367 *A.*2d 1168 (1976), *appeal after remand*, 74 *N.J.* 313, 378 *A.*2d 18 (1977), the Court acknowledged that even if parental rights cannot be terminated on statutory grounds, "exceptional circumstances" based on the probability of serious psychological harm to the child may deprive a parent of custody. *Ibid. Sees v. Baber*, 74 *N.J.* 201, 221-22, 377 *A.*2d 628 (1977), recognized the same principle.
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> [*Watkins*, *supra*, 163 *N.J.* at 246-47.]

Importantly, in distinguishing between best interests and the proper standard -- gross misconduct, unfitness, or exceptional circumstances -- Justice Coleman observed:

> A significant difference between the child's best interests test and the parental termination or "exceptional circumstances" standard is that the former does not always require proof of harm to the child. In contrast, *the latter always requires proof of serious physical or psychological harm or a substantial likelihood of such harm.*
>
> [*Id.* at 248 (emphasis added).]

In other words, avoiding harm to the child is polestar and the constitutional imperative that is necessary to overcome the presumption in favor of the parent's decision and to justify intrusion into family life.

Once the presumption is overcome, *Watkins* explains the methodology to be adopted:

> The standard that controls a custody dispute between a third party and a parent involves a two-step analysis. The first step requires application of the parental termination standard or a finding of "exceptional circumstances." Although an award of custody to a third party does not involve a termination of all parental rights, "such an award destroys any pretense of a normal parent-child relationship and eliminates nearly all of the natural incidents of parenthood including everyday care and nurturing which are part and parcel of the bond between a parent and child." *Zack v. Fiebert*, 235 *N.J. Super.* 424, 432, 563 *A.*2d 58 (App. Div. 1989). "It is cardinal [in our society] that the custody, care and nurture of the child reside first in the parents." *Ginsberg v. New York*, 390 *U.S.* 629, 639, 88 *S. Ct.* 1274, 1280, 20 *L. Ed.* 2d 195 (1968). Because the right to custody is a fundamental one protected by the constitution, *In re Guardianship of K.H.O.*, *supra*, 161 *N.J.* at 347, 736 *A.*2d 1246, the parental termination or "exceptional circumstances" standard is required to pass constitutional muster in this type of custody dispute. That principle is consistent with *Zack* and *Todd*, which stand for the proposition that when a third party, such as a stepparent, establishes psychological parentage with the child, the third party stands in the shoes of a natural parent. *Zack*, *supra*, 235 *N.J. Super.* at 432-33, 563 *A.*2d 58; [*Todd v. Sheridan*, 268 *N.J. Super.* 387, 397, 633 *A.*2d 1009, 1014 (App. Div. 1993)]. That means that when the "exceptional

> circumstances" prong is satisfied, for example by establishing that the third party has become a psychological parent, the standard for determining custody is the same as between two fit parents: the child's best interest test articulated in *N.J.S.A.* 9:2-4c. *Zack, supra*, 235 *N.J. Super.* at 433, 563 A.2d 58.
>
> If either the statutory parental termination standard or the "exceptional circumstances" prong is satisfied, the second step requires the court to decide whether awarding custody to the third party would promote the best interests of the child. A child's "best interests" standard "does not contain within it any idealized lifestyles." [*In re Baby M*, 109 *N.J.* 396, 460, 537 *A.*2d 1227, 1260 (1998)]. It "can never mean the better interest of the child." *Division of Youth [&] Family [Servs.] v. A.W.*, 103 *N.J.* 591, 603, 512 *A.*2d 438 (1986). "It is not a choice between a home with all the amenities and a simple apartment, or an upbringing with the classics on the bookshelf as opposed to the mass media, or even between parents or providers of vastly unequal skills." *Ibid.* (citations omitted). That said, the point to be emphasized is that the best interest of the child cannot validly ground an award of custody to a third party over the objection of a fit parent without an initial court finding that the standard for termination of the rights of a non-consenting parent or the "exceptional circumstances" prong has been satisfied.
>
> [*Watkins, supra*, 163 *N.J.* at 253-55.]

Because the Grandparent Visitation Statute is an incursion on a fundamental right (the right to parental autonomy), under *Watkins*, it is subject to strict scrutiny and must be narrowly tailored to advance a compelling state interest. Our prior jurisprudence establishes clearly that the only state interest

warranting the invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent is the avoidance of harm to the child. When no harm threatens a child's welfare, the State lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit. However, when harm is proved and the presumption in favor of a fit parent's decision making is overcome, the court must decide the issue of an appropriate visitation schedule based on the child's best interests.

Although *Troxel* avoided confronting that issue directly, we are satisfied that prior United States Supreme Court decisions fully support our conclusion that interference with parental autonomy will be tolerated only to avoid harm to the health or welfare of a child. *Compare Yoder*, 406 *U.S.* at 230, 92 *S. Ct.* at 1540-41, 32 *L. Ed.* 2d at 33-34 (noting that interference with childrearing was not justified because Amish children would not be physically or mentally *harmed* from receiving an Amish education as opposed to public education (emphasis added)); *Stanley*, *supra*, 405 *U.S.* at 649, 92 *S. Ct.* at 1211, 31 *L. Ed.* 2d at 557 (requiring showing of parental *unfitness* with concomitant harm to child before terminating unwed father's parental rights (emphasis added)); *Pierce*, *supra*, 268 *U.S.* at 534, 45 *S. Ct.* at 573, 69 *L. Ed.* at 1078 (holding that state's interest was inadequate to justify interference in family life because children were not *harmed* by parents' decision to send their children to private schools as those schools fulfilled their obligations (emphasis added)); *Meyer*, 262 *U.S.* at 403, 43 *S. Ct.* at 628, 67 *L. Ed.* at 1046-47 (striking down state law that forbade children from learning foreign language because, among other things, such knowledge was not "so clearly *harmful* as to justify its inhibition with the consequent infringement of rights long freely enjoyed" (emphasis added)), *with Prince*, *supra*, 321 *U.S.* at 169-70, 64 *S. Ct.* at 444, 88 *L. Ed.* at 654 (upholding parent's conviction for violating state child labor laws because selling religious magazines to public could lead to emotional, psychological, or physical *injury* to child (emphasis added)).

In reaching that conclusion, it bears repeating that a dispute between a fit custodial parent and the child's grandparent is not a contest between equals. We have long recognized that the best interest standard, which is the tiebreaker between fit parents,[3] is inapplicable when a fit parent is in a struggle for custody with a third party. *Watkins*, *supra*, 163 *N.J.* at 253-54; *Todd*, *supra*, 268 *N.J. Super.* at 396-97; *Zack*, *supra*, 235 *N.J. Super.* at 432-33.

Because custody and visitation applications by a third party both implicate the right to family autonomy and privacy, both are subject to the same constitutional protection. *See, e.g.*, *R.S.C. v. J.B.C.*, 812 *So.* 2d 361, 369 (Ala. Civ. App. 2001) (noting that visitation is essentially form of temporary custody while it is being exercised) (footnote omitted); *Roth*, *supra*, 789 *A.*2d at 447 n.13 (remarking that "[v]isitation is 'a limited form of custody during the time the visitation rights are being exercised'" (quoting *In re Marriage of Gayden*, 280 *Cal. Rptr.* 862 (Cal. Ct. App. 1991))). Nevertheless, it would be unrealistic not to distinguish between an award of custody to a third party and grandparent visitation based on the level of intrusion into family life that each entails. The former is obviously a greater invasion of family autonomy and privacy than the latter. It is for that reason that we have declined to adopt the position of our colleague who would require grandparents to prove by clear and convincing evidence the necessity for visitation to avoid harm to the children. *Post* at ___ (slip op. at 1) (Verniero, J., concurring in part, dissenting in part). We instead approve the preponderance of the evidence burden in the statute as fully protecting the fundamental rights of parents when coupled with the harm standard.

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[3] *See Watkins*, *supra*, 163 *N.J.* at 253 ("When the dispute is between two fit parents, the best interest of the child standard controls because both parents are presumed to be equally entitled to custody."). That is also the standard to be applied to a contest between a fit parent and one who has stood in the shoes of the parent to the child (*i.e.* a psychological parent). *See V.C.*, *supra*, 163 *N.J.* at 227-28, 230 ("When there is a conflict over custody and visitation between the legal parent and a psychological parent, the legal paradigm is that of two legal parents and the standard to be applied is the best interests of the child."). Although a grandparent could qualify as a psychological parent if he or she had functioned as a parent, that is not the case here.

Thus, in every case in which visitation is denied, the grandparents bear the burden of establishing by a preponderance of the evidence that visitation is necessary to avoid harm to the child. The grandparents' evidence can be expert or factual. For example, they may rely on the death of a parent or the breakup of the child's home through divorce or separation. In fact, many of the fifty grandparent visitation statutes specifically recognize the potential for harm when a parent has died or a family breakup has occurred and visitation is denied. In addition, the termination of a long-standing relationship between the grandparents and the child, with expert testimony assessing the effect of those circumstances, could form the basis for a finding of harm. *See, e.g.*, *Roth*, *supra*, 789 *A.*2d at 445 (noting that proof of substantial, emotional ties between child and nonparent could result in harm to child if contact with that person is denied or curtailed); *Blixt*, *supra*, 774 *N.E.*2d at 1060 (observing that "[t]he requirement of significant harm presupposes proof of a showing of a significant preexisting relationship between the grandparent and the child"). The possibilities are as varied as the factual scenarios presented.

If the court agrees that the potential for harm has been shown, the presumption in favor of parental decision making will be deemed overcome. At that point, the parent must offer a visitation schedule. If the grandparents are satisfied, that will be the end of the inquiry. If not, a second step will be undertaken -- an assessment of the schedule. The presumption in favor of parental decision making having been overcome, the court should approve a schedule that it finds is in the child's best interest, based on the application of the statutory factors. *See N.J.S.A.* 9:2-7.1 (listing statutory factors); *Watkins*, *supra*, 163 *N.J.* at 254 (noting that once "exceptional circumstances" are found, court should award custody based on child's best interests).

When visitation is not denied outright but the grandparents challenge the sufficiency of the proffered schedule, the same standard will apply. They will be required to prove that visitation is necessary and that the proffered visitation schedule is inadequate to avoid harm to the child. Once those proofs satisfy the court and the presumption in favor of parental decision making is overcome,

the court will be required to develop a schedule that is in the child's best interest based on the statutory factors.

Our resolution results in sustaining the statute by adding a threshold harm standard that is a constitutional necessity because a parent's right to family privacy and autonomy are at issue. All other provisions of the statute remain intact. We note that where necessary to save a statute, "appropriate construction [to] restore [it] to health" is a well-established rule. *First Family Mortgage Corp. v. Durham*, 108 *N.J.* 277, 290 (1987), *appeal dismissed*, 487 *U.S.* 1211, 108 *S. Ct.* 2860, 101 *L. Ed.* 2d 897, *and cert. dismissed*, 487 *U.S.* 1213, 108 *S. Ct.* 2863, 101 *L. Ed.* 2d 899 (1988).

IX

We turn now to the trial court's findings. Procedurally, the court took pains to recognize *Troxel*; stated that it was giving "great deference to Mr. Moriarty's request by way of visitation"; and determined that the burden of proof was on the grandparents. The court then made findings of fact, addressing each of the statutory factors.

Regarding the relationship between the children and the grandparents, the court observed:

> In this case we have a situation where the children have a very extensive relationship with the grandparents. They spent years where they were seeing the grandparents every other weekend. This is not the usual situation with grandparents, this is a closer relationship. They spent much more time with the grandparents than in many other families. I had in evidence photographs taken by the grandparents at some of the family outings with the grandchildren which substantiate the testimony of the grandparents as to the many, many activities that took place when they were with the children from basically the children's very early years until the present time.

. . . .

> Also, the relationship between the children and the grandparents is significant in a different way because their mother has died recently. Their link to their mother is through their grandparents and through that branch of the family. These children are very aware and were very bonded apparently with their mother and very distressed by her death and very upset by her death.
>
> In any event, the children have a relationship, a special relationship with their grandparents, not only because they spent so much time with them in the past and have gone to so many different activities and have learned a lot educationally and have a bond with their cousin, but also because it is through their grandparents that they can reconnect with their mother. Brian in particular indicated in the Family Services report that he hears his mother speaking to him upon occasion. I think the [Moriartys] have made efforts to give treatment and help and counseling to these children. They understand that they suffered a loss. But the grandparents can offer the children a link with their mother, a love for their mother, an understanding of their mother, a sense of being whole with their mother and their mother's side of the family that cannot be obtained elsewhere.

The court then turned to the relationship between the Moriartys and the grandparents:

> There is a very bad relationship between Mr. [Moriarty] and the Bradts. The Family Services report indicates that Mr. [Moriarty] has alienated the children from the grandparents and that he tried to prevent visitation between [the mother] and the children. Mr. [Moriarty], when he testified about his former in-laws, he could not

completely contain his hostile emotions. I had to ask him several times to keep his voice down because he raised his voice. When referring to the grandparents he said that they were evil. That he had a Christian household and they were evil. He described them as being alcoholics, drug addicts and murderers. He described the grandfather as consistently hitting the children. He described the grandmother as being an alcoholic, as he also described the grandfather that way. He said that the grandfather had molested [the mother]. There seems to be some indication that [the mother] indicated that she was molested by her grandfather, not the party in this case. But Mr. [Moriarty] testified that it was Jack Bradt who had molested [the mother].

Mr. [Moriarty] blamed the Bradts completely and totally for the problems that their daughter Julie suffered. It was his view that they caused this problem and it was his, Mr. [Moriarty]'s, obligation to protect Brian and Tara from the evil influence of the grandparents. Mr. [Moriarty] has to his credit tried to modify some of these extreme views most of the time when he talks about the situation, but under oath on the stand I think I'm quite accurate in reflecting what his emotional and belief system is towards the grandparents.

So that through the litigation he talks about the activities that the children have and the fact that the grandparents want to interfere with these activities, but when pressed on the stand he admitted that it wasn't the activities so much as the influence which the grandparents have on the children which is what he is trying to protect them from. And that makes absolute sense to me. It isn't that he is so worried that one of the children might miss hockey practice or might not get to go to a birthday party, it is because he is, in his view

> and his opinion these grandparents exercise an evil influence on the children. And so with regard to that factor, the relationship between the children's father and the grandparents is a poor relationship and there has been significant hostility. I mentioned the domestic violence restraining order that was granted to the grandmother against the father and there have been other police interaction, some of which were testified to and some of which were not, but were in the papers.

The time that has elapsed since the children last had contact with the applicants was addressed this way:

> This is not a situation where the children have not had contact with the grandparents for a long time. There has been visitation ordered. . . . [T]here has been contact as recently as October, last month. So there's been a lot of contact recently between grandparents and grandchildren.

The court then turned to the effect that visitation will have on the relationship between the children and the children's parents. Of that, the court stated:

> I don't think visitation will have any effect on the relationship between Tara and Brian and their father and stepmother. By all accounts the [Moriartys] have a very close relationship with Tara and Brian and I cannot see that these children having visitation with their grandparents, whatever the duration, is going to affect the children's relationship with their parents, that is with their father and their stepmother. I do think that the [Moriartys] understand, I hope that they understand, I think that they understand, that denigrating and putting down the grandparents to the children is a very destructive thing to do and I would expect that they would not do that. I know there are allegations back and forth that the adults

say negative things about each other, but I would expect them not to do that in front of the children.

With respect to the good faith of the grandparents, the court observed:

> The grandparents here are filing the application in good faith and I think that they have modified their request in good faith because they have testified under oath that they consulted with various professionals about the extent to which they should be involved with their grandchildren's life and again, for whatever reasons but that being one of them, they have withdrawn the requests that they made earlier.
>
> . . . .
>
> However, they are in total good faith in their application and in filing this. They want to spend time and be a part of their grandchildren's lives. They love their grandchildren and they believe that it is in their grandchildren's best interest to have regular extensive contact with their grandparents.

The court also found that there was no history of emotional, physical, or sexual abuse or neglect by the grandparents.

The trial court's most critical findings were as follows:

> The other factor that I would put in here would be the death of the mother and the fact that it is extremely important that the children continue a bond with their mother's side of the family. And the experts all agreed on that. Family Services agreed on it and Dr. Judith Brown [Greif] agreed on it, that it was important that there be extensive visitation with the grandparents.

. . . .

Dr. [Greif], who did not interview the parties but she read the Family Services evaluation and took their evaluation to be accurate in terms of what they found, and she indicated that this in her view, and she is very well regarded and very knowledgeable and very experienced in matters of custody evaluations and strained relationships, and she said that if, in fact, as the Family Services found that the [Moriartys] were alienating the children from their grandparents, that that alienation could not be counteracted with a short visit. That it requires the time for the children to be immersed in the environment of the grandparents to get away from the alienation and be able to have a good time with the grandparents without feeling guilty towards the father and their stepmother that they are having a good time with the grandparents.

. . . .

I asked Dr. [Greif] whether any harm would come to the children if visitation was as limited as that requested by Mr. [Moriarty] and what she said is that allowing such limited visitation would allow the alienation by the father and his wife towards the grandparents to succeed. Because let me just say, the reason I asked Dr. [Greif] this is because it seemed to me that certainly the possibility was there that putting these children in between these adults who are so hostile towards each other would be a negative thing for them and maybe it would be just better, since they're with Mr. [Moriarty] who's a fit parent and his wife, to just keep them there and let them have them give up their relationship with the grandparents and at least there would not be so much strife. So I asked Dr. [Greif] what would the harm be of allowing only

> the limited visitation that Mr. [Moriarty] is requesting. The answer is the harm would be that the alienation would succeed and that the children would believe essentially that half of them, that their mother's half is evil, is damaged, is bad, and that this would cause self-esteem problems for the children since the children know that they're made up of their mother and their father. So if their mother's family is so evil and bad, it means that the children themselves, it would mean to the children, that they themselves are half bad or half evil and that this would be a very destructive thing psychologically for these children.

The court went on to establish the visitation order previously described and stated:

> The reason that I am interfering, if you will, with Mr. [Moriarty]'s desire with regard to this other visit is to protect the children from the harm that would befall them if they were alienated from their grandparents. This trip once every two months for two overnights would allow the children to be in the environment of their grandparents. Allow them to continue to go on outdoors activities. To continue from time to time through the year to meet with their cousin Natalie. To have other family activities with the extended family of their mother. And to know that they are still a full and complete part of that family.

In a sense, the court presaged our opinion by the finding that visitation with the grandparents was necessary to avoid harm to the children. That finding, which was fully supported by the record, overcame the presumption in favor of Moriarty's decision making and allowed the court to fashion carefully a schedule to serve the children's best interests.

The judgment of the Appellate Division is reversed. The order of the trial court is reinstated.

CHIEF JUSTICE PORITZ and JUSTICES COLEMAN, LaVECCHIA, ZAZZALI, and ALBIN join in JUSTICE LONG's opinion. JUSTICE VERNIERO filed a separate opinion concurring in part and dissenting in part.

VERNIERO, J., concurring in part, dissenting in part.

I concur in much of the Court's opinion. Specifically, I agree that a fit parent's decision regarding his or her child's visitation with a non-parent can be overridden only by evidence of demonstrable physical or psychological harm to the child. Unlike the majority, however, I believe that the movant must establish such harm by clear and convincing proof, not by a simple preponderance of the evidence. In that respect, I subscribe entirely to the view articulated by the American Civil Liberties Union in its *amicus* brief:

> The existence of demonstrable harm is a fact-intensive inquiry that of course should be performed by the trial court in the first instance. It may well embrace the concept of emotional injury that a child may suffer if a previously established positive relationship with a grandparent or sibling is suddenly severed. But because the court necessarily acts with less than complete knowledge and understanding of all the complex factors that are relevant in making this determination, and because special deference must be afforded to the wishes of the parent, an additional procedural safeguard is needed to compensate for this inherent limitation in the judicial fact-finding process. A finding that harm exists should be proved not merely by a simple

preponderance of the evidence standard, but by the enhanced "clear and convincing evidence" standard that applies when individual constitutional interests are at stake. [*See, e.g.*,] *Santosky v. Kramer*, 455 *U.S.* 745[, 102 *S. Ct.* 1388, 71 *L. Ed.* 2d 599] (1982) (requiring clear and convincing evidence of neglect to terminate parental rights); *V.C. v. M.J.B.*, 163 *N.J.* 200[, *cert. denied*, 531 *U.S.* 926, 121 *S. Ct.* 302, 148 *L. Ed.* 2d 243] (2000) (requiring clear and convincing evidence of harm to deny psychological parent visitation). *See generally*, *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242[, 106 *S. Ct.* 2505, 91 *L. Ed.* 2d 202] (1986) (requiring clear and convincing evidence in establishing actual malice in libel case); *E.B. v. Verniero*, 119 *F.*3d [1077] (3d Cir. 1997) (requiring clear and convincing evidence, rather than mere preponderance of evidence, of probability of reoffense in Megan's Law notification in order to overcome due process and privacy interests of registrant)[, *cert. denied sub nom.*, *W.P. v. Verniero*, 522 *U.S.* 1109, 118 *S. Ct.* 1039, 140 *L. Ed.* 2d 105 (1998)].

In allegations of psychological harm, it is often easy, and perhaps too easy, to articulate a colorable claim of such harm and thereby undermine parental judgment. Thus, the "clear and convincing evidence" standard can be of very real assistance in mandating adherence to constitutional norms, particularly in cases such as this, where the "harm" that would allegedly result from curtailing, but not eliminating, visitation between the Bradts and their grandchildren has been colorably articulated, but perhaps not convincingly demonstrated.

The Court appropriately models its approach on the standard articulated in our prior case, *Watkins v. Nelson*, 163 *N.J.*

235 (2000). We were not required in *Watkins* to specify whether a clear and convincing showing of harm would be required in the present setting. We did, however, observe that "the law should not disturb the parent/child relationship except for the strongest reasons and only upon a clear showing of a parent's gross misconduct or unfitness or of other extraordinary circumstances affecting the welfare of the child." *Id.* at 245 (internal quotation marks and citation omitted). I construe that statement as being consistent with our imposing a clear and convincing burden of proof within the context of the current dispute.

I do not wish to prolong this litigation any more than is necessary. Given the fundamental constitutional issues at stake, however, I see no choice but to direct a remand to the trial court for further proceedings. It would be best for the children, of course, if the parties were to resolve their differences amicably and without further judicial involvement. Absent that resolution, which no longer appears possible, the trial court must intervene. It should do so only after permitting the parties to argue and submit additional evidence, if any, consistent with the elevated burden of proof to which I have adverted. If the movants succeed in satisfying that burden, then the trial court should approve a visitation schedule in the same manner set forth by the majority.

To summarize: I do not condone plaintiff's reaction to the Bradts. As the trial court found, however, there is no allegation that plaintiff is an unfit parent. As a result, plaintiff's decision in respect of visitation should be immune from judicial intervention absent a showing by clear and convincing evidence of harm to the children. Accordingly, I would remand the matter to the trial court to determine whether that standard has been satisfied. Both children are now teenagers and soon will be of age to decide these issues for themselves. The process, however, is best served by the trial court ratifying, modifying, or rescinding its prior decision after it applies what I perceive to be the correct test. In all other respects, I agree with the Court's opinion.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2866-00T5

PATRICK MORIARTY,

Plaintiff-Appellant,

v.

JULIA E. BRADT,[1]

Defendant,

and

LYNN JACK BRADT and PATRICIA BRADT,

Intervenors-Respondents.[2]

Argued: March 6, 2002 - Decided: April 10, 2002
Before Judges Baime, Newman and Fall.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FM-O2-07-97.

Robert T. Corcoran argued the cause for appellant (Mr. Corcoran, attorney; Christopher R. Cavalli, of counsel and on the brief).

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[1] Julia E. Bradt is deceased.

[2] Lynn Jack Bradt and Patricia Bradt are alternatively designated in the record as "third-party plaintiffs" and "third- party defendants." We correctly refer to them here as Intervenors. *See R.* 4:33. .

Francis W. Donahue argued the cause for respondents (Donahue, Braun, Hagan, Klein & Newsome, attorneys; Mr. Donahue, of counsel, and Terryann Bradley on the brief).

Ann Marie Seaton, Senior Deputy Attorney General, argued the cause for amicus curiae State of New Jersey (David Samson, Attorney General, attorney; Nancy Kaplen, Assistant Attorney General, of counsel; Ms. Seaton, on the brief).

PER CURIAM

In this grandparent visitation action plaintiff, Patrick Moriarty, appeals from entry of an order on December 22, 2000, granting visitation to Lynn Jack Bradt and Patricia Bradt (the Bradts), the grandparents of Brian Moriarty, born on October 28, 1987 and Tara Moriarty, born on March 23, 1990. We conclude that the grandparent visitation statute, N.J.S.A. 9:2-7.1, has been unconstitutionally applied. We reverse and remand for entry of an order granting the Bradts visitation with their grandchildren for four hours, one day each month, in the State of New Jersey, which is in accord with the grandparent visitation proposed by plaintiff.

Plaintiff and defendant, Julia Bradt, were married on April 26, 1987, and are the parents of Brian and Tara. The parties separated in October 1990 and plaintiff instituted a divorce action in the Family Part, Union County. Defendant suffered from depression and was hospitalized at the time of the separation. The Bradts intervened in the divorce case on the issue of visitation.

On September 25, 1991, the matter came before the trial court on various pre-judgment issues, including custody and visitation. Defendant withdrew her application for custody of the children and an agreement was reached among plaintiff, defendant and the Bradts, memorialized in an order executed on October 28, 1991, that, *inter alia*:

1. Awarded custody of both children to plaintiff;

2. The Bradts, who resided in Pennsylvania, submitted to the jurisdiction of the Family Part on

behalf of themselves and defendant on issues of parenting time and grandparent visitation, with an "appropriate pleading" to be filed on behalf of the Bradts, naming them as third party plaintiffs;

3. The Bradts were awarded visitation with the children on alternate weekends, from Thursday evening at 7:00 p.m. until Sunday evening at 7:30 p.m.;

4. Defendant was not to have parenting time with the children unless one or both of the Bradts were present.

A mental health expert was directed to perform a custody, parenting time and grandparent visitation evaluation, and discovery was also ordered.

A pre-judgment plenary hearing was held in October 1992, resulting in entry of an order on November 25, 1992 that awarded defendant parenting time with the children on alternate weekends, supervised by the Bradts, who reside in Easton, Pennsylvania.

The divorce action was tried over eight days in the Family Part between December 16, 1992 and January 11, 1993. A final judgment of divorce was entered on April 15, 1993, dissolving the marriage between plaintiff and defendant. Sole custody of the children was vested with plaintiff. As with the prior pendente lite orders of the court, defendant's alternate weekend parenting time with the children was to be supervised by the Bradts. Defendant was required to continue in psychiatric therapy, undergo random drug testing, and attend weekly Alcoholic Anonymous meetings and support groups. Defendant and the Bradts were prohibited from having the children medically treated, except in the case of an emergency.

On January 291 1994, defendant married Donald Hallingse. Plaintiff also remarried, in August 1994; his wife, Antonia, was previously married and has two children from her

first marriage. Plaintiff and Antonia have one child together, James, born on November 30, 1995.

On August 24, 1994, a consent order was executed, modifying the final judgment of divorce to eliminate the requirement for supervision of defendant's alternate weekend parenting-time sessions.

Defendant died on November 9, 1999, apparently from an overdose of prescription medication. Almost immediately following defendant's death, the long-standing acrimony and disputes between the parties resumed. Two days after defendant's death, the Bradts applied to the Family Part in Bergen County for an order requiring plaintiff to permit the children to attend their mother's funeral services. After oral argument, an order was entered by Judge Elijah L. Miller on November 12,1999, requiring plaintiff to bring the children to their mother's funeral service. The order also directed that the children have regular and continued visitation with the Bradts.

On further application by the Bradts, an order was entered on December 3,1999, directing plaintiff to show' cause on December 16, 1999, why the Bradts should not have holiday visitation with the children. Plaintiff opposed the application, sought supervised visitation for the Bradts, and moved for recusal of Judge Miller.

Judge Miller granted the recusal application and the December 16, 1999 hearing was conducted before Judge Koblitz. The judge took testimony from plaintiff and both qrandparents. The judge entered three orders on that date directing that, pending the outcome of a plenary hearing on grandparent visitation issues, the Bradts shall have holiday visitation with the children from December 26 to December 28, 1999 and, thereafter, once every five weeks, consisting of two consecutive overnights. Diagnostic evaluations were ordered of plaintiff, the Bradts, the children and Donald Hallingse, to be conducted by Family and Social Services Federation. The Bradts were also directed not to bring the children into the presence of Mr. Hallingse pending further order.

On January 26, 2000, the evaluation reports were filed with the court. The reports recommend that the Bradts have unsupervised visitation with the children for two full days once each month in New Jersey, subject to further review. Counseling was also recommended. According to the evaluation, plaintiff insisted that the grandparents' visits with the children be supervised, contending that since they are the ones, who raised defendant, they must bear responsibility for her psychiatric problems. Plaintiff advised the evaluators that he was fearful the Bradts could have a negative effect on the children. Conversely, the Bradts accused plaintiff of lying under oath and improperly alienating the children against them.

The Bradts' application for an order to show cause on visitation issues was denied on February 17, 2000, the court finding there were no emergent issues and that the Bradts had improperly sought visitation for a weekend to which they were not entitled. As the result of a telephone conference, the court entered an order on April 4, 2000, affording the Bradts overnight visitation with the children on April 7 and 8, 2000.

Plaintiff filed a motion seeking an order granting summary judgment on the issue of grandparent visitation, and affording the Bradts one day of visitation each month within Bergen County. Plaintiff's motion was primarily based upon the United States Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

On June 26, 2000, the trial court commenced the plenary hearing. Two out-of-state witnesses were called and testified on behalf of the Bradts. On June 28, 2000, the court heard argument on plaintiff's motion for summary judgment. The judge reserved decision and re-scheduled the summary judgment motion to August 7,2000, and the plenary hearing to September 5, 2000. However, the court entered a pendente lite order on June 28, 2000, directing that the Bradts have summer visitation with the children from July 13, 2000 at 10:00 a.m. to July 17, 2000 at 3:00 p.m.

Plaintiff's application for a stay of the terms of the June 28, 2000 order was denied by the trial court by order entered on July 12, 2000.

On August 7, 2000, additional oral argument on plaintiff's summary judgment motion was heard before Judge Koblitz. In denying the motion, the judge stated, in pertinent part:

> The facts in *Troxel* are remarkably similar to the facts in this case before me. And it's noteworthy. that the U.S. Supreme Court did not remand the case to the Washington Trial Court to decide using -- giving the parent deference whether the type of visitation requested by the mother was in the best interest of the child. The U.S. Supreme Court just accepted that plan as being good enough constitutionally.
>
> So I think the grandparents here have an extremely heavy burden, given the factual similarity between this case and the Washington case of *Troxel*.
>
> I've also heard testimony from both grandparents in a limited fashion, and from two of the grandparents' witnesses in a thorough fashion. So what I have not heard, I guess, is the parties' further testimony and the experts.
>
> And therefore, I don't know what the experts in particular, I don't know what they're going to say. With regard to the parties, I think I have a pretty good flavor of what their position is.
>
> And I'm not going to grant summary judgment because I think the grandparents are entitled to have the experts testify and the rest of their witnesses. But I do think that given the *Troxel* case they're going to have a very heavy burden and they should understand that when choosing to continue on in this litigation, which is very costly.

. . . .

> I'm going to deny the motion for summary judgment and we will proceed with a continuation of the hearing on September 5th.

By letter to Judge Koblitz dated August 20, 2000, plaintiff advised that he, would not be appearing September 5, 2000 because his employment duties required that he be out of the country until September 14, 2000. Plaintiff also requested that Judge Koblitz recuse herself for allegedly failing to follow the dictates of the *Troxel* case. As a result, an order was entered by the court on September 12, 2000, adjourning the hearing to September 18, 2000, and awarding counsel for the Bradts a $1,000 fee, payable by plaintiff.

The plenary hearing commenced on September 18, 2000, and continued on September 19, 20 and 22, 2000. Prior to resumption of the hearing, an order was entered on October 6, 2000, directing that the Bradts have overnight visitation with the children for two nights on the weekend of October 6, 2000, the order provided for continuation of the plenary hearing on October 17, 2000.

The hearing resumed on October 17, 2000 and concluded on October 20, 2000. The judge reserved decision. On November 9, 2000, the judge delivered her decision on the case stating, in pertinent part:

> Originally (plaintiff) took the position that the grandparents should only have supervised visitation. Originally the grandparents took the position they wanted visitation every other weekend. Basically they wanted to take over the amount of visitation that their daughter had. Both parties modified their visitation requests during the course of this litigation. . . . [Plaintiff,] the father, indicates that he now believes that it would be in the best interest of his children to have four hours a month unsupervised visitation with the

grandparents which would encompass an activity of the children and a meal.

The grandparents are asking for visitation once a month. Every other visit to be two nights and the alternate visits to be daytime visits of five to six hours. And then they would like two weeks over the summer, one week in July and one week in August.

I'd first like to consider the statute in New Jersey regarding grandparental visitation. In December when I heard some testimony in this matter I made some findings with regard to the statute and those findings can be found, the transcript is C-1 in evidence I and my decision begins on Page 130. And I'll incorporate those findings in my decision today.

The statute. . . . [N.J.S.A.] 9:2-7.1 indicates that a grandparent may make application before the Court for an order for visitation. It shall be the burden of the grandparent to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child. The Court should consider the following factors. The relationship between the child and the applicant. In this case we have a situation where the children have a very extensive relationship with the grandparents. They spent years where they were seeing the grandparents every other weekend. This is not the usual situation with grandparents, this is a closer relationship. They spent much more time with the grandparents than in many other families. So the relationship between the grandparents and the children is one which involved historically a lot of time spent together.

. . . .

Also, the relationship between the children and the grandparents is significant in a different way because their mother has died recently. Their link to their mother is through their grandparents and through that branch of the family. These children are very aware and were very bonded apparently with their mother and very distressed by her death.

. . . .

The second factor the Court should consider is the relationship between each of the child's parents or the person with whom the child is residing and the applicant. There is a very bad relationship between (plaintiff) and the Bradts. The Family Services report indicates that [plaintiff] has alienated. the children from the grandparents and that he tried to prevent visitation between [defendant] and the children. (plaintiff], when he testified about his former in-laws, he could not completely contain his hostile emotions. I had to ask him several times to keep his voice down because he raised his voice. When referring to the grandparents he said that they. were evil. That he had a Christian household and they were evil. He described them as being alcoholics, drug addicts and murderers. He described the grandfather as constantly hitting the children. He described the grandmother as being an alcoholic, as he also described the grandfather that way. He said that the grandfather had molested [defendant]. There seems to be some indication that [defendant] indicated that she was molested by her grandfather, not the party in this case. But [plaintiff] testified that it was Jack Bradt who had molested [defendant).

[Plaintiff] blamed the Bradts completely and totally for the problems that their daughter . . . suffered. It was his view that they caused this

problem and it was his . . . obligation to protect Brian and Tara from the evil influence of the grandparents. [Plaintiff] has to his credit tried to modify some of these extreme views most of the time when he talks about the situation, but under oath on the stand I think I'm quite accurate in reflecting what his emotional and belief system is towards the grandparents.

So that through the litigation he talks about the activities that the children have and the fact that the grandparents want to interfere with these activities, but when pressed on the stand he admitted that it wasn't the activities so much as the influence which the grandparents have on the children which is what he is trying to protect them from. And that makes absolute sense to me. . . . And so with regard to that factor, the relationship between the father and the grandparents is a poor relationship and there has been significant hostility. I mentioned the domestic violence restraining order that was granted to the grandmother against the [defendant] and there have been other police interaction[s], some of which were testified to and some of which were not, but were in the papers.

The third factor is the time which has elapsed since the child last had contact with the applicant. This is not a situation where the children have not had contact with the grandparents for a long time. There has been visitation ordered. There's been testimony as to what extent it was complied with. . . . So there's been a lot of contact recently between grandparents and grandchildren.

Number four is the effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing. I don't think the visitation will have

any effect on the relationship between Tara and Brian and their father and stepmother. By all accounts the Moriartys have a very close relationship with Tara and Brian and I cannot see that these children having visitation with their grandparents, whatever the duration, is going to affect the children' s relationship with their parents, that is their father and their stepmother . . .

Factor number five is not relevant.

Factor number six, the good faith of the applicant filing the application. The grandparents here are filing the application in good faith and I think that they have modified their request in good faith because they have testified under oath that they consulted with various professionals about the extent to which they should be involved with their grandchildren's life and again, for whatever reasons but that being one of them, they have withdrawn the requests that they made earlier. I think a portion of the antagonism that occurred between these parties is attributable to the extent of contact that the Bradts originally asked for. . . . The Bradts are not the parents of these children. They do not step in and become the parents when their daughter dies. And I think that it's unfortunate that that was the position that the Bradts took. . . . But that's not what I view to be an appropriate position for the grandparents to take.

However, they are in total good faith in their application and filing this. They want to spend time and be a part of their grandchildren's lives. They love their grandchildren and they believe that it is in their grandchildren's best interest to have regular extensive contact with their grandparents.

Number seven is any history of physical, emotional or sexual abuse or neglect by the applicant. I do not find that the grandparents .in any way abused or neglected the children and that's after hearing (plaintiff's] comment. . . . To the contrary, there is a history of extensive concern, care, exposure to positive events and nature and cultural events, shopping. All kinds of things like that.

Any other factor relevant to the best interests of the child. The other factor that I would put in here would be the death of the mother and the fact that it is extremely important that the children continue a bond with their mother's side of the family. And the experts all agreed on that. Family Services recommended one two-day weekends a month with the grandparents staying at a motel or hotel in New Jersey and spending time with the grandchildren all day Saturday, all day Sunday and spending the night at a motel or hotel. I don't find that to be a practical solution here. It's not in my view something that is conducive to a normal family relationship. It's awkward, strained. It also involves the children [in] more exchanges between the adults. And the more exchanges there are here between the adults, the more likely there is for some kind of problem in front of the children. So this is a situation where the fewer exchanges the better.

I have two concerns about [plaintiff] that I want to place on the record to make it clear what I expect of him in part. I found that [plaintiff] was not completely truthful in his testimony before me. His hatred for the Bradts, and I use that word "hatred" thoughtfully, I believe that he does hate them, caused him to exaggerate to the point of fabrication on occasion. . . .

And secondly, is his lack of complete compliance with the Court. He has not been completely compliant with my orders. . . . He does not have the right, as long as he lives in this state under our system of laws, to disregard a court order. So I have concern about that and I hope that he will think seriously about possible repercussions.

I asked Dr. Greif whether any harm would come to the children if visitation was as limited as that requested by [defendant] and what she said is that allowing such limited visitation would allow the alienation by the father and his wife towards the grandparents to succeed . . . .

I will comment very briefly on *Troxel v. Granville.* The parties did not allege that the New Jersey statute was unconstitutional, although we did *I* speak about it a little bit at the summary judgment motion. In *Troxel v. Granville* the United States Supreme Court found that the statute at stake was breathtakingly broad and that it allowed any third party to request visitation with the children and allowed the Court to.order it whenever the Court felt it was in the best interests of the children. There was no deference to the parents' perspective. The New Jersey statute is distinct in that it deals with grandparents and siblings . . . and it gives great deference to the wishes of the parents. And in my decision I have given great deference to [plaintiff's] request by way of visitation. The burden of proof in *Troxel v. Granville* was really on the parents to prove that it was not in the best interests of the children to have visitation. In the New Jersey statute the burden of proof is on the grandparent.

The visitation that I am ordering is as follows: I am ordering a visit every month except in July and August when there will be one visit for the two'

months of a longer period of time. During the rest of the year, the visits will be once a month a visit of five hours duration, which will include an activity for the children and a meal. Essentially what is requested by [plaintiff]. The other months the visit will be two overnights with the grandparents. The reason I am interfering, if you will, with [plaintiff's] desire with regard to this other visit is to protect the children from the harm that would befall them if they were alienated from their qrandparents. This trip once every two months for two overnights would allow the children to be in the environment of their grandparents. Allow them to continue to go on outdoors activities. To continue from time to time through the year to meet with their cousin Natalie. To have other family activities with the extended family of their mother. And to know that they are still a full and complete part of that family. . . .

The grandparents should make every effort to avoid those activities [of the children] that they know about. But the trip, as I understand it, is approximately two hours each way and it's not unduly burdensome for the children to take that trip five or six times a year, which is what I'm ordering . . . What I am ordering by way of visitation is significantly less than what the qrandparents asked for even in their more limited request. It is more than what [plaintiff] requested, but I think that it will interfere very little in the activities of the children.

With regard to [plaintiff's] really more primary concern that the qrandparents will somehow subvert the children, cause harm to the children, I disagree with him that the grandparents will in any way harm the children, but I am also deferring to his concerns by limiting the occasions that the grandparents will be with the children. They are

> older children. And in terms of whatever nefarious influence that the father thinks the grandparents are going to have, the children are raised by [plaintiff] and his wife. They are going to be with them almost their entire life. It is just a few overnights that I am ordering and I think that there is no reason in the world that these children will not be raised primarily by [plaintiff].
>
> With regard to [plaintiff's] request that . . . the second husband of [defendant] be banned or be prohibited from having any contact with the children, I am denying that. The family services report interviewed [him] and found that he was an appropriate and positive influence for the children. I will direct that he not have unsupervised time with the children. That one of the grandparents must be present when he is present just to allay any concerns that the father apparently has with regard to that.
>
> There will be a five-hour visit and on alternate months there will be two overnights, except for the months of July and August. And during the months of July and August, there will be only one visit and that visit will be four nights.

Orders executed on December 15, 2000 and December 22, 2000, memorialized the judge's oral decision. Significant enforcement issues persisted and the trial court issued two additional orders on February 16, 2001, enforcing the ordered visitation and clarifying the conditions thereof. On May 29, 2001, we denied plaintiff's application for a stay and modification of the terms of the grandparent visitation. On June 5, 2001 we entered an order granting the Bradts' motion to limit the scope of the appeal. Specifically, we declined to entertain arguments on the constitutionality of N.J.S.A. 9:2-7.1 because that issue was not raised below. On July 31, 2001, we entered an order declining to consider plaintiff's emergent application for a stay of the scheduled summer grandparent visitation.

On appeal, plaintiff presents the following arguments for our consideration:

POINT I

NEW JERSEY'S GRANDPARENT VISITATION STATUTE, N.J.S.A. 9:2-7.1, IS UNCONSTITUTIONAL AS APPLIED TO THE FACTS OF THIS MATTER.

POINT II

THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING EXTENSIVE, OVERNIGHT GRANDPARENTAL VISITATION TO THE BRADTS AND FAILING TO GIVE DEFERENCE TO PATRICK'S DETERMINATION OF HIS CHILDREN'S BEST INTERESTS AND PATRICK'S PROPOSED GRANDPARENTAL VISITATION ARRANGEMENT.

POINT III

THE DECEMBER 22, 2000 ORDER SHOULD BE VACATED AND AN ORDER SHOULD BE ENTERED GRANTING THE BRADTS GRANDPARENTAL VISITATION WITH THE MORIARTY CHILDREN ONE DAY PER MONTH, IN ACCORDANCE WITH PATRICK'S DETERMINATION OF HIS CHILDREN'S BEST INTERESTS.

The State has submitted an amicus curiae brief, arguing:

> The New Jersey Grandparent Visitation Statute As Interpreted In *In The Matter of the Adoption of a Child by W.P. and M.P.* and *R.T. v. J.E.* Comports with The Constitutional Standards in *Troxel v. Granville*.

Significantly, we note this appeal does not contain a facial challenge to the validity of N.J.S.A. 9:2-7.1; rather, plaintiff argues that the statute, as applied, violates his fundamental right as a parent to make decisions concerning the care, custody and control

of his children as protected under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *Troxel*, *supra*, 530 U.S. at 66, 120 S.Ct. at 2060, 147 L.Ed.2d at 57. "[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children" *Id.* at 68-69, 120 S. Ct. at 2061; 147 L. Ed.2d at 58.

In addressing this issue last year, we stated, in pertinent part:

> Because the litigation itself "implicates" the parent's constitutional rights, a grandparent's statutory right to hale a parent into court must be carefully circumscribed, particularly where, as here, the parent's fitness is not disputed. Moreover, the restrictions we advance will enhance the Legislature's policy of encouraging contact between children and their grandparents by avoiding precipitous and acrimonious resort to the courts.
>
> Suits of this nature occur when relations between the parent and grandparent have deteriorated. Before engaging the courts, grandparents should be obliged to make substantial efforts at repairing the breach and, in addition, litigation ordinarily should not be threatened before visitation has been denied with finality. If litigation becomes necessary because the parent or parents have persistently resisted the grandparents' respectful and patient overtures, it must be conducted with restraint. In other words, the grandparents must refrain from denouncing, demeaning, and impugning the parent's character.
>
> [*Wilde v. Wilde*, 341 N.J. Super. 381, 397-98 (App. Div. 2001) (citations omitted).]

In *Wilde*, the trial court held N.J.S.A. 9:2-7.1 to be facially constitutional and then, without conducting a plenary hearing to resolve disputed facts, held that the statute was constitutional as applied. *Id.* at 388. Here, in contrast, the trial judge addressed the "as applied" challenge by conducting a hearing to resolve the various factual disputes, and then engaged in a careful and meticulous analysis of each factor required to be considered under N.J.S.A. 9:2-7.1.

Here, as in *Wilde*, the plaintiff's substantive due process rights were violated by the imposition of the visitation ordered, in light of the grandparent visitation proposed by plaintiff. As the judge noted in her findings, "a portion of the antagonism that occurred between these parties is attributable to the extent of contact that the Bradts originally asked for. " The judge also properly pointed out that "[t]he Bradts are not the parents of these children. They do not step in and become the parents when their daughter dies."

As is so often the case in Family Part litigation that is polluted by acrimony and volatility, there is plenty of blame to spread around. Although the good faith of the Bradts cannot be questioned when they instituted litigation against plaintiff within days after their daughter's death to compel the children's attendance at defendant's funeral service, the long-range wisdom of that approach in light of the principles articulated in *Troxel* and *Wilde* and the litigious assault that followed, is subject to significant scrutiny. We recognize that individuals who act from the heart and with sincere, bona fide and logic-based motives often do not consider the legal ramifications of their conduct.

We find no fault with the judge's factual findings, nor with her expressed sensitivity to the best interests of these children. Indeed, there is much in the record that reflects plaintiff as an unsympathetic individual. The trial judge essentially found that plaintiff was blinded by his "hatred" of the Bradts to the extent that he would fabricate and be untruthful to the court. The judge also found that plaintiff had failed to completely comply with orders issued by 'the court. This approach by plaintiff, essentially - the end justifies the means - gives us pause for concern.

However, by our decision today, we do not condone his conduct. nor his views - we abhor them. We merely accord plaintiff's fundamental right as a parent to make decisions concerning the care, custody and control of his children the constitutional respect to which it is entitled. Here, plaintiff has determined that the best decision concerning the children, at this point, is to .provide the grandparents visitation with the children once each month for a period of four hours. That decision is entitled to the constitutional presumption that a fit parent acts in accordance with the best interest of his children. *Troxel*, supra, 530 U.S.. at 68, 120 S. Ct. at 2061, 147 L. Ed. 2d at 58.

Notably, plaintiff's decision did not implicate a cessation of visitation between the children and the Bradts; it merely limited or curtailed same, a parental decision that cannot, under these facts, be subject to attack. Although the trial judge stated that, under *Troxel*, she gave great deference to plaintiff's wishes, the judge ultimately overrode those wishes because of the perceived need to protect the children from the harm that would otherwise befall them if they did not see their grandparents on a regular and substantial basis. Under these circumstances, that interference with plaintiff's parental decision to afford the limited visitation offered was constitutionally impermissible.

It appears that these grandparents have much to offer their grandchildren. We are hopeful that the passage of time and a tempering of the litigious approach by the Bradts will melt plaintiff's myopic attitude toward them and lead to a wholesome and healthy relationship between these children and their grandparents. We encourage the. parties to work to that end. Continued acrimony and bitterness benefits no one, and is particularly harmful to the children.

Reversed and remanded for entry of an order granting the Bradts four hours of visitation with their grandchildren once each month in New Jersey.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
BERGEN COUNTY, NEW JERSEY

DOCKET NO. FM-02-7-97

A.D. #_____

PATRICK MORIARTY,	)	
	)	
Plaintiff,	)	TRANSCRIPT
	)	OF
vs.	)	DECISION
	)	ON
LYNN BRADT and PATRICIA BRADT,	)	PLENARY HEARING
	)	
Defendants.	)	

Place: Bergen County Justice Center
10 Main Street
Hackensack, NJ 07601

Date: November 9, 2000

BEFORE: HON. ELLEN L. KOBLITZ, P.J.F.P.

TRANSCRIPT ORDERED BY:

MICHELE NEUMANN (Law Offices of Robert Corcoran)

APPEARANCES:

CHRISTOPHER R. CAVALLI, ESQ. (Law Firm of Robert T. Corcoran) Attorney for the Plaintiff

TERRY BRADLEY, ESQ. (Donahue, Braun, Hagan, Klein & Newsome, P.C.) Attorney for the Defendant

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Audio Recorded

THE COURT: Would you enter your appearances, please.

MR. CAVALLI: Good afternoon, Judge. Christopher Cavalli from the law firm of Robert T. Corcoran for the plaintiff, Patrick Moriarty.

MS. BRADLEY: Good afternoon, Your Honor, Terry Bradley from Donahue, Braun, Hagan, Klein & Newsome on behalf of the third-party plaintiffs.

THE COURT: Okay. Please be seated.

I scheduled this time for a decision on the plenary hearing and that's what I propose to do this afternoon is give you that oral decision. At the end of the decision if there's anything the attorneys want to say, I'll give them a very brief opportunity to say something.

I heard testimony in this matter beginning December 16th, 1999. There was a brief hearing which had been ordered by Judge Miller as the return on an Order to Show Cause. At that hearing the grandparents, Jack Bradt and Patricia Bradt testified, as did the biological father, Patrick Moriarty. By agreement between the parties, that testimony was included in the plenary hearing so that it didn't have to be repeated.

Judge Miller had ordered that hearing. He then recused himself at the request of the biological father. He had ordered a probation report. The probation report was not available in

December of '99, but did become available before the plenary hearing began and was placed into evidence.

I ordered a Family Services evaluation. That also was completed prior to the, what turned out to be the continuation of the plenary hearing, and that was placed into evidence and considered by me as well.

Also, what happened is that the United States Supreme Court decided the case of *Troxel vs. Granville* on June 5th of 2000 of this year and that prompted a motion being filed for summary judgment by the father, Mr. Moriarty, and that was decided in June. I'm actually not sure that I decided that in June. It may have been decided in September. But in any event, it was filed after obviously the decision came down in June of 2000.

On June 26th I heard testimony from James Bradt, the grandparents' oldest son and from Ellen Harencal, the Bradts' friend who lived in Pennsylvania.

Then on September 18th I heard further testimony from Catherine Price, the Bradts' friend from the Poconos; Susan Garfield, a social worker with Family Services, who was called by the grandparents. At various times through these proceedings, the grandparents had been referred to as the defendants. They were referred to at one time as third-party defendants. When I reviewed the case file, it appeared to me that they had been designated as third-party plaintiffs and that that is how they should have been referred to by all of us throughout the proceedings, however, all the evidence marked in by the grandparents was given a D, as in David, designation and all the evidence marked in by the father was given a plaintiff's designation. So to the extent that there is confusion in the record, I just want it to be clear that as best I can figure out, the grandparents did enter into the divorce case between the parents on the issue of custody and visitation and were designated as third-party plaintiffs. To further complicate the litigation, the divorce took place in Union County and Judge Whitken was the trial Judge who tried that case and also had a subsequent hearing -- or actually a prior hearing, I believe, which had to do with visitation and whether it should continue after one

of the children, Brian, was burned in an accident when the grandparents were supervising.

So part of the litigation took place in Union County and then most recently in Bergen County.

In any event, on September 18th I heard from Catherine Prince, Susan Garfield and also Dr. Judith Brown Grief, who were all called by the grandparents as witnesses.

On September 19th I heard from the grandmother, Patricia Bradt. I allowed the parties to add to anything that they had previously testified to in December and they all chose to do so. So Patricia Bradt testified on September 19th. Jack Bradt testified on September 20th and September 22nd. And then the father, Patrick Moriarty testified on October 17th.

When the motion was filed in June, after *Troxel vs. Granville* was decided, this matter was scheduled to continue by way of a plenary hearing on September 5th.

On August 29th I received a letter from the father, Mr. Moriarty, indicating he would not be present. This letter I believe I read into the record at the time had been sent from Japan but indicated that Mr. Moriarty would not be present on September 5th.

I would like to read this letter into the record. It may be for the second time, but I don't recall specifically if I read the entire record or only one paragraph of the letter -- excuse me, if I read the entire letter, or only one paragraph of the letter into the record previously, and I think it should be a part of this record. So if you will bear with me, I'm going to read it in. It is not that long. This letter is dated August 20th of the year 2000. It was received by me on the 29th.

"Dear Judge Koblitz, I bid you an outstanding day." It's handwritten, but I think I can read it. "I bid you an outstanding day. After reviewing my legal bill from my attorneys in multiples of tens of thousands of dollars, I have had to cancel my family's

planned summer holiday to Ireland. I have taken on an additional project at work in hopes of gaining additional income and have reduced our planned holiday to only two weeks vacationing in Massachusetts, Connecticut and Vermont. Taken together, I will be returning home on Thursday morning, September 14th, 2000. As such, I will be unavailable for the trial date now scheduled in this matter for September 5th.

"I have informed my attorneys to use the work they have done to date in a legal brief presented to you. My attorneys are not to be involved otherwise as I cannot afford their presence for the balance of that trial. My lawyers have informed me you are unwilling to follow the Supreme Court ruling and the Family Services report as you do not want to be in the media as the first New Jersey Judge to have ruled on such. As you know, you informed my lawyers of this in court even prior to your recent denial in my motion for summary judgment. I would ask you to resign from this case and immediately" -- I cannot read the next word but I think you'll get the meaning without it, "and immediately," something, "it up to the next level of Judges who can maintain their personal views on grandparental visitation as well as holding to the law," I'm not sure of the next word, "their ultimate responsibility and providing me as the father of Brian Moriarty and Tara Moriarty to determine their best interests. It is not fair for my family and I to bear the additional burden of further legal costs.

"You insist I go according to your rulings of which I disagree and have different personal opinions and I have, yet you do not abide by the Supreme Court ruling! yourself! As you know, I have spent many years protecting my children's best interests. Irrespective, a Judge under your review did not follow through with earlier rulings to ensure my ex was drug and alcohol-free. It is by the grace of God my children were not there in her care when she took her life through a drug overdose. That same Judge, while emphasizing his background as a Criminal Court Judge, saw fit to physically and mentally threaten me and my family. That same Judge has received no recourse from supervisors such as yourself for putting my children in harm's way and risking their psychological and physical well being.

"I will no longer force my children to visitations of length and times they disagree with. Their best interests must be served!!! I demand justice and will gain it through the media or elsewhere if required. I hold no ill will towards yourself or your hard-earned good offices. However, justice must be served by upholding the law of the land, either by yourself or another responsible Judge.

"Thank you for your time and consideration. As always I wish you great personal and professional success!!!

"Sincerely Patrick J. Moriarty."

I sustained an objection when Mr. Donahue asked Mr. Moriarty on the stand questions about his allegations against Judge Miller that led to Judge Miller recusing himself, because neither attorney indicated they were going to call Judge Miller as a witness in the case. But that letter does raise that allegation and to my knowledge Mr. Moriarty made an allegation about Judge Miller having had some personal contact with him in the community which Judge Miller denied. And in any event, that's what led to Judge Miller recusing himself in this case and I took over the case.

So I had scheduled the matter for September 5th. I received this letter. It came in on August 29th, I believe, due tc Labor Day weekend, that I did not actually see it until the morning of the 5th. So in spite of that being very last minute notice, I did put off the hearing until September 18th as Mr. Moriarty had indicated in the letter that he would be back on the 14th. It was my understanding from this letter that he and his family had gone to New England and that's why he was not available on the 5th

On the 18th Mr. Moriarty did not appear and the matter continued without him and I directed his attorneys to continue to represent him.

Then when testimony was completed, he was given until October 17th so that he would have an opportunity to testify. A message was left with my staff that he was unable to be here to testify in the afternoon as it was scheduled. So we rescheduled it

for the morning of the 17th to allow Mr. Moriarty to testify and he did come in and testify on that day.

A very brief history of the family situation here. Julia Bradt, the daughter of the third-party plaintiffs, the grandparents, married Patrick Moriarty in April of 1987. Brian was born October 28th, 1987 and Tara -- so Brian is now 13 years old. Tara, who is ten, was born March 23rd, 1990.

The parents, that is Patrick Moriarty and Julia Bradt, separated in October of 1990. The first court order which was marked D-1 in evidence was dated October 28th, 1991 and that order gave custody to the father. That was a Union County order, and visitation to the grandparents every other weekend, beginning Thursday evening until Sunday evening. So it was actually longer than a weekend.

The mother was given supervised visitation. It had to be supervised by one of her parents. This case was very litigious and was in the courts therefore from the beginning of the breakup of the marriage and has continued basically unrelentingly from that time until now. There was virtually nothing agreed on. There's one instance where the mother was permitted unsupervised visitation. It was a consent order. But the rest of the orders which I saw were not consented to.

On September 25th this order, September 25th of 1992, approximately almost a year later, the visitation was suspended due to the accidental scalding of Brian at the sky lodge. Judge Whitken held a plenary hearing October 13th, 14th and 15th of '92 and after that hearing he decided to recommence the same pattern of visitation except that rather than beginning Thursday evening, it began Friday evening through Sunday.

I should add also that the grandmother received a final restraining order against the father, Mr. Moriarty, and that restraining order stemmed from an incident that occurred, according to Mr. Moriarty's testimony and I believe this is true from the other evidence in the case, occurred when the grandparents returned the children after this incident.

The parties were divorced in December of '92 -- well, actually the trial began in December of '92 and went till January of '93. The divorce trial was held on December 16th, 21st and 22nd of '92 and January 4th, 5th, 6th and 7th and 11th of '93. So it was a rather lengthy divorce trial. Mr. Moriarty obtained sole custody of the children and the same supervised visitation schedule that had been previously ordered in October of '92 -- well, actually the order was November 25th, '92, was continued in the divorce decree which was signed April 15th of 1993. In other words, the grandparents had the children every other weekend and the mother had supervised visitation over those same periods of time, supervised by at least one of her parents.

Now, the one consent order that I found in this case, and I did not review the file from Union County so I'm not saying that I saw everything, but I did see what was placed in evidence before me. And the one consent order that I did see was from August of 1994, August 24th, 1994, which by consent allowed unsupervised visitation to the mother.

In the probation report the probation investigator spoke to the Rivervale Police who said that they were -- there was pickup and delivery at Rivervale for a period of time. The police reported constant problems.

In November of 1999 the mother, Julie, passed away and the Bradts came to court before Judge Miller to obtain an order for the children to go to the funeral and that Judge Miller did rule that the children should go.

Originally Mr. Moriarty took the position that the grandparents should have only supervised visitation. When I say originally, I mean after the death of the mother. The original position before me, I guess you could say, or let's just say the original position after Julie passed away. Mr. Moriarty took the position that the grandparents should only have supervised visitation. Originally the grandparents took the position they wanted visitation every other weekend. Basically they wanted to take over the amount of visitation that their daughter had. Both parties modified their visitation requests during the course of this

litigation. Whether that modification was due to the U.S. Supreme Court decision due to strategy on their part, due to consultation with professionals in this area, due to reevaluation of the strength of the case, I don't know. I don't think that it's necessarily important to know, but it's worth commenting on, that the parties did modify their position and they came somewhat closer together. Mr. Moriarty, the father, indicates that he now believes that it would be in the best interest of his children to have four hours a month of unsupervised visitation with the grandparents which would encompass an activity of the children and a meal.

The grandparents are asking for visitation once a month. Every other visit to be two nights and the alternate visits to be daytime visits of five to six hours. And then they would like two weeks over the summer, one week in July and one week in August.

I'd first like to consider the statute in New Jersey regarding grandparental visitation. In December when I heard some testimony in this matter I made some findings with regard to the statute and those findings can be found, the transcript is C-1 in evidence, and my decision begins on Page 130. And I'll incorporate those findings in my decision today.

At that time I dealt with the father's concerns about the injuries to the children. The fact that the scalding incident was fully heard by Judge Whitken in Union County and Judge Whitken found that it was not the fault of the grandparents because he continued their visitation. They were the supervisors in essence who were ensuring that their daughter acted appropriately with her children. So for him to continue that visitation is clear that he did not feel that they had done anything inappropriate that led to that injury. The injury is quite serious, there's no question about it. The boy got seriously burned and had to undergo treatment that I'm sure was painful for the child.

There was another incident that the father complained about, Brian breaking his leg. The record seems to support the fact that that happened when the boy was with his mother and that again it was an accidental injury and not involving the grandparents.

The statute -- I may in part be repeating what I said in December but if so, just bear with me.

The statue 9:2-7.1 indicates that a grandparent may make application before the Court for an order for visitation. It shall be the burden of the grandparent to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child. The Court should consider the following factors. The relationship between the child and the applicant. In this case we have a situation where the children have a very extensive relationship with the grandparents. They spent years where they were seeing the grandparents every other weekend. This is not the usual situation with grandparents, this is a closer relationship. They spent much more time with the grandparents than in many other families. I had in evidence photographs taken by the grandparents at some of the family outings with the grandchildren which substantiate the testimony of the grandparents as to the many, many activities that took place when they were with the children from basically the children's very early years until the present time. Some of the activities involve extended family on the mother's side. Other activities do not.

The grandmother, Mrs. Bradt, spoke at length about the activities that she took the children on and I would refer to Page 78 of the transcript of December 16th. Mrs. Bradt is a scientist. She's a professor and she involved the children in various activities involving biology and the outdoors. They went sailing, kayaking. She talks of an incident where she and Tara went exploring to bears' caves and brought back a skeleton of an animal and determined what animal it was. The grandparents testified that the grandmother also took Tara shopping. Their son's daughter Natalie is good friends with Tara and engages in many activities the two girls do together with the adults. Brian is involved, and Mr. Moriarty also agreed with this, that he has sort of an engineering bent as his grandfather does and they're involved in many activities that exploit that interest.

So the relationship between the grandparents and the children is one which involved historically a lot of time spent together. A lot of activities done together which are different than

the types of activities they would most likely engage in when they were at home. Their times with their grandparents offered them an opportunity to learn about different things and do different things than they were exposed to in the rest of their life.

Also, the relationship between the children and the grandparents is significant in a different way because their mother has died recently. Their link to their mother is through their grandparents and through that branch of the family. These children are very aware and were very bonded apparently with their mother and very distressed by her death and very upset by her death. I heard testimony about the explanation for her death and what was told to the children with regard to how she died. Mr. Moriarty took great offense at the fact that his daughter seemed to believe that Julie died because she went out and froze to death at night. Apparently, I'm not actually sure what the cause of death was, that was not introduced as evidence in this hearing, but it is clear, absolutely clear to me that Julie had serious psychiatric problems and serious substance abuse problems and that is the reason why she had only supervised visitation with her children for a period of time. And there was treatment given for these problems but it seems to be, from the evidence that I heard and the exhibits that I had a chance to review, it seems to be that prescription drugs were involved with her death. Whether she took more than was prescribed or something of that nature. She seemed to have been diagnosed at one time or another as having a bipolar disorder and as being depressed. Mr. Moriarty had placed various hospital records into evidence and I looked through those records and it seemed that those were the type of diagnosis that she received.

But in any event, apparently she did leave the home and her body was found and it was not that obvious what the cause of death was, at least not immediately.

In any event, the children have a relationship, a special relationship with their grandparents, not only because they spent so much time with them in the past and have gone to so many different activities and have learned a lot educationally and have a bond with their cousin, but also because it is through their

grandparents that they can reconnect with their mother. Brian in particular indicated in the Family Services report that he hears his mother speaking to him upon occasion. I think the Moriartys have made efforts to give treatment and help and counseling to these children. They understand that they suffered a loss. But the grandparents can offer the children a link with their mother, a love for their mother, an understanding of their mother, a sense of being whole with their mother and their mother's side of the family that cannot be obtained elsewhere.

The second factor the Court should consider is the relationship between each of the child's parents or the person with whom the child is residing and the applicant. There is a very bad relationship between Mr. Moriarty and the Bradts. The Family Services report indicates that Mr. Moriarty has alienated the children from the grandparents and that he tried to prevent visitation between Julie and the children. Mr. Moriarty, when he testified about his former in-laws, he could not completely contain his hostile emotions. I had to ask him several times to keep his voice down because he raised his voice. When referring to the grandparents he said that they were evil. That he had a Christian household and they were evil. He described them as being alcoholics, drug addicts and murderers. He described the grandfather as consistently hitting the children. He described the grandmother as being an alcoholic, as he also described the grandfather that way. He said that the grandfather had molested Julie. There seems to be some indication that Julie indicated that she was molested by her grandfather, not the party in this case. But Mr. Moriarty testified that it was Jack Bradt who had molested Julie.

Mr. Moriarty blamed the Bradts completely and totally for the problems that their daughter Julie suffered. It was his view that they caused this problem and it was his, Mr. Moriarty's, obligation to protect Brian and Tara from the evil influence of the grandparents. Mr. Moriarty has to his credit tried to modify some of these extreme views most of the time when he talks about the situation, but under oath on the stand I think I'm quite accurate in reflecting what his emotional and belief system is towards the grandparents.

So that through the litigation he talks about the activities that the children have and the fact that the grandparents want to interfere with these activities, but when pressed on the stand he admitted that it wasn't the activities so much as the influence which the grandparents have on the children which is what he is trying to protect them from. And that makes absolute sense to me. It isn't that he is so worried that one of the children might miss hockey practice or might not get to go to a birthday party, it is because he is, in his view and his opinion these grandparents exercise an evil influence on the children. And so with regard to that factor, the relationship between the children's father and the grandparents is a poor relationship and there has been significant hostility. I mentioned the domestic violence restraining order that was granted to the grandmother against the father and there have been other police interaction, some of which were testified to and some of which were not, but were in the papers.

The third factor is the time which has elapsed since the child last had contact with the applicant. This is not a situation where the children have not had contact with the grandparents for a long time. There has been visitation ordered. There's been testimony as to what extent it was complied with. It was to some extent, not with other at other times, but there has been contact as recently as October, last month. So there's been a lot of contact recently between grandparents and grandchildren.

Number four is the effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing. I don't think visitation will have any effect on the relationship between Tara and Brian and their father and stepmother. By all accounts the Moriartys have a very close relationship with Tara and Brian and I cannot see that these children having visitation with their grandparents, whatever the duration, is going to affect the children's relationship with their parents, that is with their father and their stepmother. I do think that the Moriartys understand, I hope that they understand, I think that they understand, that denigrating and putting down the grandparents to the children is a very destructive thing to do and I would expect that they would not do that. I know there are allegations back and forth that the adults say negative

things about each other, but I would expect them not to do that in front of the children.

Factor number five is not relevant.

Factor number six, the good faith of the applicant filing the application. The grandparents here are filing the application in good faith and I think that they have modified their request in good faith because they have testified under oath that they consulted with various professionals about the extent to which they should be involved with their grandchildren's life and again, for whatever reasons but that being one of them, they have withdrawn the requests that they made earlier. I think a portion of the antagonism that occurred between these parties is attributable to the extent of contact that the Bradts originally asked for. There is one letter where the attorney for the Bradts, Mr. Donahue, wrote a letter saying his clients would like to visit with the children from Thanksgiving Day through Sunday or any portion thereof. Mr. Moriarty took that to mean that the grandparents wanted the children for the entire Thanksgiving weekend. That's not literally how the wording is, although it certainly could be viewed that way. I think that it just heated up the antagonism between the parties for the Bradts to ask for such extensive visitation as they originally did and even when they asked for visitation more recently, to frame it in such a way that it could be viewed as asking for the entire Thanksgiving weekend, which is inappropriate. The Bradts are not the parents of these children. They do not step in and become the parents when their daughter dies. And I think that it's unfortunate that that was the position that the Bradts took. I understand why they might have taken that position, because that is what happened originally, when the mother could not visit with the children, the grandparents did step in and were given every other weekend visitation and lengthy weekends. So they might have viewed that now that the mother is no longer here to participate in the children's lives, that they would like to step in and take over her portion of the visitation. But that's not what I view to be an appropriate position for the grandparents to take.

However, they are in total good faith in their application and in filing this. They want to spend time and be a part of their

grandchildren's lives. They love their grandchildren and they believe that it is in their grandchildren's best interest to have regular extensive contact with their grandparents.

Number seven is any history of physical, emotional or sexual abuse or neglect by the applicant. I do not find that the grandparents in any way abused or neglected the children and that's after hearing Mr. Moriarty's comment. But as I say, this case was very well litigated and Judge Whitken had an extensive hearing with regard to Brian having spilled the hot chocolate on him which caused the burning and continued unsupervised visitation with the grandparents. So I do not find that there is any history at all of abuse or neglect. To the contrary, there is a history of extensive concern, care, exposure to positive events and nature and cultural events, shopping. All kinds of things like that.

Any other factor relevant to the best interests of the child. The other factor that I would put in here would be the death of the mother and the fact that it is extremely important that the children continue a bond with their mother's side of the family. And the experts all agreed on that. Family Services agreed on it and Dr. Judith Brown Greif agreed on it, that it was important that there be extensive visitation with the grandparents.

Family Services recommended one two-day weekends a month with the grandparents staying at a motel or hotel in New Jersey and spending time with the grandchildren all day Saturday, all day Sunday and spending the night at a motel or a hotel. I don't find that to be a practical solution here. It's not in my view something that is conducive to a normal family relationship. It's awkward, strained. It also involves the children more exchanges between the adults. And the more exchanges that there are here between the adults, the more likely there is for some kind of problem in front of the children. So this is a situation where the fewer exchanges the better.

Dr. Greif, who did not interview the parties but she read the Family Services evaluation and took their evaluation to be accurate in terms of what they found, and she indicated that this in her view, and she is very well regarded and very knowledgeable

and very experienced in matters of custody evaluations and strained relationships, and she said that if, in fact, as the Family Services found that the Moriartys were alienating the children from their grandparents, that that alienation could not be counteracted with a short visit. That it requires the time for the children to be immersed in the environment of the grandparents to get away from the alienation and be able to have a good time with the grandparents without feeling guilty towards the father and their stepmother that they are having a good time with the grandparents.

I have two concerns about Mr. Moriarty that I want to place on the record to make it clear what I expect of him in part. I found that Mr. Moriarty was not completely truthful in his testimony before me. His hatred for the Bradts, and I use that word "hatred" thoughtfully, I believe that he does hate them, caused him to exaggerate to the point of fabrication on occasion. As I said, he testified the Bradts were evil. That they were alcoholics, as was everyone in their family. And all of that negative comment. He indicated that the grandfather consistently hit the children. He said that although the probation report does not reflect that as a concern that Mr. Moriarty had, the probation report does reflect the concern that Mr. Moriarty had that Julie's problems, her psychological problems and substance abuse problems were caused by her parents. So Probation Department clearly interviewed Mr. Moriarty and recorded what his concerns were and at that time his concern was not that the grandfather consistently hit the children. So I find that to be an exaggeration on his part, something that he decided to testify to, but not something that is a genuine issue. In the Family Services report Dr. Gluck indicated that he questioned Mr. Moriarty when he mentioned hitting and the best he could determine was that he was talking about spanking the children as a disciplinary measure and not hitting the children in the connotation that that has of child abuse.

Mr. Moriarty indicated that Mrs. Bradt, the grandmother, drank and passed out in the 1930s. Mrs. Bradt is a college professor as I indicated. Both of the Bradts have had very substantial occupations. Mr. Bradt is now retired. He worked most recently for Human Services, the Director of Human Services

in the community in which he lives. Prior to that he was CEO of a company. Mrs. Bradt has been a college professor. Mr. Moriarty, since he blames them completely for Julie's problems, he exaggerates their negative qualities tremendously. He also, interestingly, blames Julie completely for the breakup of his marriage. When he was questioned by Family Services he indicated that he gave 1,000 percent to the marriage. It was totally Julie's fault that the marriage broke up.

Also, another reason why I say that Mr. Moriarty was not completely truthful is he testified that he was unaware of my order requiring him to provide two overnights of visitation in October. It was Columbus Day weekend and I ordered that he must provide -- there were three nights of vacation that two out of the three nights, whichever two consecutive nights he chose, would be provided to the Bradts for the children. Mr. Bradt's attorney, Mr. Cavalli, an associate in the firm of his attorney, wrote a letter, which was placed into evidence, in which he offered the nights, which nights his clients would allow the Bradts to take the children. In that letter Mr. Cavalli indicates that he's been in contact with Mrs. Moriarty. I believe Mr. Moriarty was out of the country. Mr. Moriarty testified that he and his wife have an excellent relationship. At one point he testified that he was -- he had originally said he was not going to furnish the list of activities to the grandparents even though I had ordered him to do so. I asked him why he was choosing to be contemptuous of the Court and I believe we took a break at that point. It was either a luncheon break or some other break. He came back on the stand and he said he would provide those activities. He had spoken to his wife and she had convinced him that he should. And basically that's why he was doing it, because his wife thought it would be a good idea. Well, Mr. Cavalli's letter indicates that which of the two out of the three nights would be advisable for visitation and indicates that he's been in contact with -- this is D-27 in evidence. He offers Friday -- she'll be picked up 7:00 p.m. on Friday, October 6th and she'll be returned on Sunday, October 8th at 11:30 a.m. And he indicates in his letter how unhappy his clients are to be complying with the order. All of the activities the children will be missing and that the children express their displeasure to Mrs. Moriarty, who Mr. Cavalli had been communicating with as his client is still

out of the country on business. There's no question, no question in my mind that when Mr. Moriarty came home from his business trip, his wife, if she had not already told him over the phone in their phone communications, would have informed him that this was my order. That these were the two nights that she had selected and that Mr. Cavalli was giving that information to the adversary. In fact, that letter was copied to Mr. Moriarty and was sent on September 27th. Mr. Moriarty, nonetheless, took the stand and testified that he had no idea that this order was in effect, that he was supposed to give two nights overnight visitation and he only allowed the grandparents to have the children during the day for one day. That's not accurate. There's no other way to put it. It's just not accurate.

So that particular incident involves both of the concerns that I have about Mr. Moriarty. One is his lack of complete truthfulness. That is, he has not been completely truthful. And secondly, is his lack of complete compliance with the Court. He has not been completely compliant with my orders. And even in his letter where he says he is not going to force his children to go on visitations, that letter was written August 20th. He disobeyed the Court order with regard to the visitation on October 6th and 7th. I have great concern about this because Mr. Moriarty has every right in the world to take this case, as he has been litigating and continue to litigate and go on to other courts, Appellate Courts and so on. He does not have the right, as long as he lives in this state under our system of laws, to disregard a court order. So I have concern about that and I hope that he will think seriously about possible repercussions.

Also, with regard to the scheduling of the trial, he essentially did not appear when he didn't want to appear and only came when he wanted to come. And I went well beyond what I would do perhaps in other situations in order to accommodate Mr. Moriarty because I wanted him to have his peace. I wanted him to have his day in court to testify. And I accommodated him. But it is important that he understand that the court orders must be complied with. I should point out also that when Mr. Moriarty asked Judge Miller to recuse himself in December, it was for contact which he alleged had occurred in September. So there was

a significant delay between the alleged contact and the allegation of its occurrence.

He also in essence asked me to recuse myself on August 29th when he said it should go to a different Judge. And apparently took something that I had said in court to mean that I was not going to decide this case or something of that nature. I'm not exactly sure where that belief on his part came from.

Mr. Moriarty did testify that he would now provide the grandparents with the activities, of the children's activities. I don't know if he's done so or not but he will be ordered to do that.

Another factor that is sort of concerning to me with regard to Mr. Moriarty's participation in the court process is he has complained bitterly the cost of his attorneys. Now, he indicated to Family Services that he had a $200,000 base salary in 1999 and had made $300,000 in addition. That's what he said. So his salary in 1999 was $500,000. And I'll say parenthetically that Mrs. Bradt makes $52,000 as a professor. Mr. Bradt is retired. I just comment on that, not because people should want to pay attorney bills and I have no idea what the bills were that Mr. Moriarty was complaining about, and they might well have been very high, but just to put in context here that according to Mr. Moriarty his income is such that he can afford, it would seem to me, this legal process and that is the process that we have in our country, although it is sometimes difficult for parties to afford legal counsel.

There is absolutely no allegation or no question but that the Moriartys are fit parents to these children. There has been no allegation raised by the Bradts that Mr. Moriarty and his wife are not fit to parent these children. And every evidence is that they are. The Moriartys have five children between them. They have Tara and Brian, two children born to Mrs. Moriarty by an earlier marriage and a fifth child who is their child. And I take this from the reports. And there's nothing in any of these reports to indicate that they are not fit parents.

I asked Dr. Greif whether any harm would come to the children if visitation was as limited as that requested by Mr. Moriarty and what she said is that allowing such limited visitation would allow the alienation by the father and his wife towards the grandparents to succeed. Because let me just say, the reason I asked Dr. Greif this is because it seemed to me that certainly the possibility was there that putting these children in between these adults who are so hostile towards each other would be a negative thing for them and maybe it would be just better, since they're with Mr. Moriarty who's a fit parent and his wife, to just keep them there and let them have them give up their relationship with the grandparents and at least there would not be so much strife. So I asked Dr. Greif what would the harm be of allowing only the limited visitation that Mr. Moriarty is requesting. The answer is the harm would be that the alienation would succeed and that the children would believe essentially that half of them, that their mother's half is evil, is damaged, is bad, and that this would cause self-esteem problems for the children since the children know that they're made up of their mother and their father. So if their mother's family is so evil and bad, it means that the children themselves, it would mean to the children, that they themselves are half bad or half evil and that this would be a very destructive thing psychologically for these children.

I will comment very briefly on *Troxel vs. Granville*. The parties did not allege that the New Jersey statute was unconstitutional, although we did speak about it a little bit at the summary judgment motion. In *Troxel vs. Granville* the United States Supreme Court found that the statute at stake was breathtakingly broad and that it allowed any third party to request visitation with the children and allowed the Court to order it whenever the Court felt it was in the best interest of the children. There was no deference to the parents' perspective. The New Jersey statute is distinct in that it deals with grandparents and siblings, and in this case we're dealing with grandparents, and it gives great deference to the wishes of the parents. And in my decision I give great deference to Mr. Moriarty's request by way of visitation. The burden of proof in *Troxel vs. Granville* was really on the parents to prove that it was not in the best interests of the

children to have visitation. In the New Jersey statute the burden of proof is on the grandparent.

The visitation that I am ordering is as follows: I am ordering a visit every month except in July and August when there will be one visit for the two months of a longer period of time. During the rest of the year, the visits will be once a month a visit of five hours duration, which will include an activity for the children and a meal. Essentially what is requested by Mr. Moriarty. The other months the visit will be two overnights with the grandparents. The reason that I am interfering, if you will, with Mr. Moriarty's desire with regard to this other visit is to protect the children from the harm that would befall them if they were alienated from their grandparents. This trip once every two months for two overnights would allow the children to be in the environment of their grandparents. Allow them to continue to go on outdoors activities. To continue from time to time through the year to meet with their cousin Natalie. To have other family activities with the extended family of their mother. And to know that they are still a full and complete part of that family. The children in the Family Services report indicated that they were unhappy with all the transportation and they were unhappy with missing out on their activities. Mr. Moriarty is to provide, if he has not already, the grandparents with the activities of the children. Now, I don't necessarily anticipate that he has at all because as the seasons change and the sporting activities change, new schedules come out. So what I am ordering him to do is to mail to the Bradts, and this will have to be done in such a way that he keeps proof that he did it, because otherwise it's going to be another problem, the schedules as they come out of activities. Now, I realize that he doesn't have schedules of birthday parties and that kind of thing, what he has schedules of is their sporting activities, those kind of things that are scheduled in advance. And that's what he should provide to the grandparents.

The grandparents should make every effort to avoid those activities that they know about. But the trip, as I understand it, is approximately two hours each way and it's not unduly burdensome for the children to take that trip five or six times a year, which is what I'm ordering. Parents take that trip all the time. Every other

weekend sometimes children are carted back and forth greater distances. Both children have close relationships with their grandparents, especially Brian, but also Tara. And it's important that they maintain that relationship. During the summer months, July and August, there will be one longer visit which will be four overnights and that will allow some time with the grandparents on a sort of mini vacation with the extended family. What I am ordering by way of visitation is significantly less than what the grandparents asked for, even in their final more limited request. It is more than what Mr. Moriarty has requested, but I think that it will interfere very little in the activities of the children.

With regard to Mr. Moriarty's really more primary concern that the grandparents will somehow subvert the children, cause harm to the children, I disagree with him that the grandparents will in any way harm the children, but I am also deferring to his concerns by limiting the occasions that the grandparents will be with the children. The children are not infants. They are older children. And in terms of whatever nefarious influence that the father thinks the grandparents are going to have, the children are raised by Mr. Moriarty and his wife. They are going to be with them almost their entire life. It is just a few overnights that I am ordering and I think that there is no reason in the world that these children will not be raised primarily by Mr. Moriarty.

With regard to Mr. Moriarty's request that Donald Hollingsly, the second husband of Julie, be banned or be prohibited from having contact with the children, I am denying that. The Family Services report interviewed Mr. Hollingsly and found that he was an appropriate and positive influence for the children. I will direct that he will not have unsupervised time with the children. That one of the grandparents must be present when he is present just to allay any concerns that the father apparently has with regard to that.

Okay. Is there anything that the attorneys want to say?

MR. CAVALLI: Judge, I'm just a little confused. I thought I understood the whole schedule until you said something

that confused me. Is it my understanding that it's every month, one day, five hours in Jersey -- in New Jersey, with an activity and a meal, except for the months of July -- okay. Can you just repeat that part then?

THE COURT: Okay. It's every other month.

MR. CAVALLI: Okay.

THE COURT: There will be a five-hour visit and on alternate months there will be two overnights, except for the months of July and August. And during the months of July and August, there will be only one visit and that visit will be four nights.

MR. CAVALLI: So the one month, five hours in New Jersey. The next month a -- what is it, from Friday night to Sunday or is it one -- you said two overnights or one overnight?

THE COURT: Two overnights.

MR. CAVALLI: So it's from a Friday evening to a Sunday?

THE COURT: During the day.

MR. CAVALLI: Do you want to give us --

THE COURT: Well, to a Sunday afternoon. A Friday evening to a Sunday afternoon. I'll be as specific as you would like me to be, but I'm going to try not to dictate the terms if the children have something going on that would make that unreasonable.

MS. BRADLEY: Your Honor, I'm sorry. With July and August, it's one visitation which is comprised of four overnights?

THE COURT: Four overnights, right.

MR. CAVALLI: One visitation each month?

THE COURT: No. One visitation during those two months.

MR. CAVALLI: Of four overnights.

THE COURT: Of four overnights.

MR. CAVALLI: Judge, Mr. Moriarty has requested to make a statement to the Court and I told him I would ask you if that would be allowed and is appropriate.

THE COURT: No. The case is over as far as I'm concerned. This aspect of the case is over. I'm just allowing the attorneys to ask exactly the questions they're asking to clarify the decision, because they're going to have to make up an order.

MR. CAVALLI: He might have overheard that portion, Judge. My client indicated that he would comply with everything in the order. He does take exception to the provision regarding Mr. Hollingsly. Maybe we could just either work that out with counsel or perhaps file the appropriate application just on that issue. But apparently the remainder of Your Honor's decision is acceptable.

THE COURT: All right. Well --

MR. CAVALLI: Certainly at this point I don't even know his reasons right now. So maybe perhaps we can work it out with counsel and if not, either have a conference call with Your Honor or just certainly file the appropriate --

MS. BRADLEY: You've already rendered your decision. It's very important to the Bradts that Mr. Hollingsly be involved. There's been no -- we know how Mr. Moriarty in the past has complied with Your Honor's decision, so whether he's going to comply or not, we have yet to see. But I don't think Donald Hollingsly, being a part or not being a part, is really --

MR. MORIARTY: My daughter is at risk, Your Honor. She will not be with that man.

THE COURT: All right. Well, I will say this. What is most important to me is that the grandparents have contact with the children. If the issue of Mr. Hollingsly is going to cause a major blowup, I think -- which Mr. Moriarty says it will from the background here, I think that my suggestion would be that the grandparents exercise the visitation without Mr. Hollingsly until there can be a chance to air that. I read the Family Services report, which I directed that -- Mr. Moriarty, you can't speak to your attorney while I'm talking because then he can't listen to me and listen to you --

MR. MORIARTY: Yes, Your Honor.

THE COURT: -- at the same time.

I asked Family Services to have contact with Mr. Hollingsly. They did. It was in their report. There was some discussion about the concerns that Mr. Moriarty had with regard to drinking. That Mr. Hollingsly drank and he had a DWI from some time ago.

MR. MORIARTY: Many DWI's Your Honor.

THE COURT: MR. MORIARTY, please.

However, during the course of the hearing, I really didn't hear much else about Mr. Hollingsly. So I have to make my decision based on the evidence. The evidence was the report of Family Services which recommended it. And the input that I had gotten up to that point. I had previously ordered that he not have contact with the children before the Family Services report. My decision is what it is. Of course, you can make motions to reconsider or whatever you want to make. I just really want to urge on the parties, I know the parties have a very difficult time agreeing to absolutely anything under the sun, but I think the most important thing is for the children to have contact with their grandparents. The other issue I consider to be a side issue and I don't know what more to say beyond that. But that I think everybody has to really think about what is most important for the

children and in my view what's most important is the contact with the grandparents.

MR. MORIARTY: But, Your Honor, I can't let my children go if that man is going to be with them.

THE COURT: I understand your position.

MR. MORIARTY: And I won't.

THE COURT: I'll be here for a little while longer. If the attorneys want to clarify anything with me or talk to me about what to do from now on.

With regard to this order, Ms. Bradley, you will prepare an order.

MS. BRADLEY: And we're going to do it as you put on the record.

THE COURT: As I placed on the record. But before you leave, just check in with me. If this is going to be a major problem. I don't want to --

MS. BRADLEY: I mean --

THE COURT: -- prevent the children from seeing their grandparents --

MS. BRADLEY: Right.

THE COURT: -- that's the important thing.

MS. BRADLEY: I think that the Bradts will heed your advice in terms of, you know, using their own discretion, but at the same time Mr. Moriarty's demands that he's not going to let his children go, shouldn't override what Your Honor's decision just was.

THE COURT: Absolutely. He is not the Appellate Division or the Supreme Court.

MS. BRADLEY: Obviously.

THE COURT: But I want these children to see their grandparents, okay?

MS. BRADLEY: I understand what you're saying. Thank you, Your Honor.

MR. CAVALLI: Thank you, Judge.

THE COURT: All right. All right. Thank you.

* * * * *

CERTIFICATION

I, PATRICIA A. KONTURA, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on tape number ****, index number **** to ****, is prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded, and to the best of my ability.

_____ Date:

PATRICIA A. KONTURA AOC #234
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NEW JERSEY STATUTES § 9:2-7.1

a. A grandparent or any sibling of a child residing in this State may make application before the Superior Court, in accordance with the Rules of Court, for an order for visitation. It shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child.

b. In making a determination on an application filed pursuant to this section, the court shall consider the following factors:

(1) The relationship between the child and the applicant;

(2) The relationship between each of the child's parents or the person with whom the child is residing and the applicant;

(3) The time which has elapsed since the child last had contact with the applicant;

(4) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;

(5) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child;

(6) The good faith of the applicant in filing the application;

(7) Any history of physical, emotional or sexual abuse or neglect by the applicant; and

(8) Any other factor relevant to the best interests of the child.

c. With regard to any application made pursuant to this section, it shall be prima facie evidence that visitation is in the child's best interest if the applicant had, in the past, been a full_time caretaker for the child.

(2)

No. 03-708

Supreme Court, U.S.
FILED
JAN 13 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PATRICK MORIARTY,

Petitioner,

v.

LYNN JACK BRADT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether review of *Moriarty v. Bradt* is appropriate when the New Jersey Supreme Court made a constitutionally sound grandparent visitation determination that comports with the United States Supreme Court decision of *Troxel v. Granville*?

2. Whether a "preponderance of the evidence" standard is appropriate when a fundamental interest is implicated and other sufficient constitutional safeguards exist?

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REASONS FOR DENYING THE PETITION

The facial constitutionality of the New Jersey Grandparent and Sibling Visitation Statute is not implicated here as petitioners solely attack the New Jersey Supreme Court's application of the state statute in *Moriarty v. Bradt*, 177 N.J. 84, 827 A.2d 203 (2003) (PA2)[1]. *See* N.J. STAT. ANN. § 9:2-7.1 (2003). However, the New Jersey State Supreme Court properly construed the New Jersey Grandparent and Sibling Visitation Statute, even fortifying its constitutional due process protection by ensuring that a parent's decisions were given special weight with the addition of a "harm to the child" standard.

Under *Moriarty*, New Jersey courts will presume that a fit parent makes a decision in the best interest of his or her child, and such presumption will not be overcome until the additional showing that "the child will be harmed without the visitation" is met. This decision is constitutionally sound and comports with the United States Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000).

The issues that arose as a result of the construction and application of the Washington Statute in *Troxel* did not exist in *Moriarty*. Simply stated, the Washington statute broadly allowed anyone to apply for visitation, and the statute was applied without affording the decisionmaking rights of the parents any heightened protection. *Troxel*, 530 U.S. at 67. The New Jersey Statute, on the other hand, permits only grandparents and siblings to seek visitation, and the New Jersey Supreme Court applied a heightened standard to protect the fundamental childrearing interest of the parent. *See* N.J. STAT. ANN. § 9:2-7.1 (2003); *Moriarty*, 177 N.J. at 114-16, 827 A.2d at 222-23 (2003).

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1. PA refers to Petitioner's Appendix.

Because the New Jersey Supreme Court took great care in balancing the best interests of the child with the fundamental rights of parents to care and raise a child by requiring proof of the potential for harm if the visitation were not granted as sought, this is not a case for review on Due Process grounds. The *Moriarty* Court recognized that the parent-grandparent tug of war over visitation was not a contest between equals, and appropriately placed the burden on the grandparent to prove that visitation is in the best interests of the child and that harm to the child would result if visitation was not granted as requested. These two tests provide sufficient constitutional protection to parental autonomy, such that a "preponderance of the evidence" evidentiary standard is sufficient. It was only fitting that this Court leave the determination of the due process standards to be applied up to the States, which are in the best position to balance public policy with the fundamental rights of its' state's constituents.

I. The Decision Of The New Jersey Supreme Court Is Constitutionally Sound And Comports With The United States Supreme Court Decision Of *Troxel v. Granville*

The New Jersey State Supreme Court has the duty and authority to enforce the public policy of New Jersey to preserve grandparent-grandchild relationships. The court made a constitutionally appropriate decision to award grandparent visitation in *Moriarty*, 177 N.J. at 84, 827 A.2d at 203, based on a sufficiently compelling justification of avoiding harm to the children at issue. Accordingly, the court's determination did not violate the Due Process Clause of the Fourteenth Amendment and presents no valid constitutional issue for this Court's review.

At issue is whether the New Jersey State Supreme Court's grandparent visitation determination violated the rights of the parent under the Due Process Clause of the Fourteenth Amendment. This Court traditionally begins its analysis of substantive due process issues by determining whether a fundamental liberty interest is implicated by the challenged state action. *See Troxel*, 530 U.S. at 86 (Stevens, J. dissenting); *Washington v. Glucksburg*, 521 U.S. 702, 720-21 (1997). Government may not infringe on fundamental liberty interests unless the state action taken is narrowly tailored to serve a compelling state interest. *See Reno v. Flores*, 507 U.S. 292, 302 (1993).

Though the Supreme Court long ago recognized the fundamental liberty interest of parents in the "care, custody, and control of their children," it has equally recognized that a parent's right to make childrearing decisions is not absolute. *See Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972) (limiting a parent's authority if it appears his or her decisions will jeopardize the health or safety of a child or create a social burden); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (the state may restrict a parent's control in order to "guard the general interest in youth's well being"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty interest in bringing up children). As Justice Stevens stated in his dissenting opinion in *Troxel*:

> While, as the Court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State . . . we have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from

> any challenge absent a threshold finding of harm . . . [E]ven a fit parent is capable of treating a child like a mere possession.

Troxel, 530 U.S. at 86 (Stevens, J., dissenting opinion).

States have a compelling interest in protecting the health and well-being of their youth. A circumstance in which a child's safety, health or well-being is at risk demands state intervention, via the states' *parens patriae* authority to protect children from harm. *See Prince v. Massachusetts*, 321 U.S. at 166-67 ("[T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare. . . ."). In nearly every aspect of life, government intrusion into a parent's right to rear children has been found to be appropriate and justified. Examples include laws governing the use of seat belts, disease vaccinations, compulsory education and child labor.

In addition to the laws each state designs to protect children, who may be particularly vulnerable in our society, the courts play a role in applying these laws, as well as reversing the decisions of parents whom the court determines may be putting their children at risk in some way.

For example, courts have specifically overridden the decisions of parents in cases where the parents refused to consent to medical treatment for a child and treatment could save the child's life. *See Parham v. J.R.*, 442 U.S. 584, 606 (1979) ("[T]he risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder' to determine whether the statutory requirements for admission are satisfied."); *Jehovah's Witnesses v. King County Hosp. Unit No. 1*, 278 F. Supp.

488 (W.D. Wash. 1967) (Washington statutes empowering superior court judges to declare children to be dependent for purpose of authorizing blood transfusions of children against expressed objections of parents were not unconstitutional), *State v. Perricone*, 37 N.J. 463, 181 A.2d 751 (1962), *cert denied*, 371 U.S. 890 (appointing guardian to order blood transfusions for child against parents' wishes).

Likewise, courts play an important role in the child custody and visitation arena. Nationwide, states have enacted visitation statutes due, in some part, to the reality of the changing American family. *See Troxel*, 530 U.S. at 64. State legislatures, including New Jersey's, recognize that situations arise in which a child's third party relationship(s) may need protection to ensure that child's welfare. *Id.* For many years, courts have applied the best interests of the child standard as a basic tool in visitation proceedings regarding third-party visitation. *Id.* at 99 (Kennedy, J., dissenting opinion).

In *Troxel*, 530 U.S. at 57, this Court addressed the constitutionality of Washington State's Third-Party visitation statute, Wash. Rev. Code § 26.10.160(3) (1994). While reaffirming that the parental right to raise children is protected by the Due Process Clause of the Fourteenth Amendment, the plurality opinion in *Troxel* specifically declined to define the scope of the parental due process right in the visitation context – nor should this Court do so now.

The *Troxel* Court recognized the fact-specific nature of visitation determinations, and that Due Process is realized through the constitutional application of grandparent visitation statutes by the states:

> [W]e agree with Justice Kennedy that the constitutionality of any standard for awarding

> visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." Because much state-court adjudication in this context occurs on a case-by case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.

Id. at 73. Correspondingly, Justice Kennedy, in his dissenting opinion, noted "[F]amily courts in the 50 States confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise." *Id.* at 101(Kennedy, J. dissenting opinion).

Notably, the constitutionality of the New Jersey Statute was not challenged in *Moriarty*, 177 N.J. at 84, 827 A.2d at 203. Based on *Troxel* and New Jersey jurisprudence, the *Moriarty* Court combined the existing best interests of the child standard with the additional requirement that the grandparent seeking visitation prove harm to the child if the requested visitation were not granted. This ensured that proper deference would be given to parents' decisionmaking and, correspondingly, that Due Process would be accorded parents in the application of the statute. When this Court did not define the precise scope of the parental due process right in *Troxel*, it purposefully left the constitutional protection of this right to the States. *Troxel*, 530 U.S. at 73. Subsequently, the New Jersey State Supreme Court appropriately safeguarded the parent's fundamental right to raise his children in *Moriarty*, 177 N.J. at 84, 827 A.2d at 203.

Coincident to a thorough analysis of this Court's *Troxel* decision, the *Moriarty* Court carefully crafted a decision that

comports with the *Troxel* standards. In *Troxel*, the problem was not that the Washington Superior Court intervened in the grandparent visitation matter, but that when it did so, it gave no special weight to the parent's decision with regard to her child's best interests regarding visitation. *Troxel*, 530 U.S. at 69. The Washington Superior Court failed to protect the parent's fundamental right to childrearing when it "contravened the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.* In other words, when a fit parent's decision with respect to visitation is subject to judicial review, a court must accord some special weight to the parent's own determination, which the Washington Superior Court failed to do. *Id.* at 70.

To the contrary, in *Moriarty*, the New Jersey Superior Court accorded special weight to the parent's decision regarding grandparent visitation. As stated by the trial judge, "[I]n my decision I give great deference to Mr. Moriarty's request by way of visitation." Transcript of Decision on Plenary Hearing, N. J. Sup. Ct, Chancery Div., Doc. FM-02-7-97 (PA84.) *Inter alia*, the trial court incorporated the Family Services evaluation, testimony of the parties and witnesses, and testimony from an expert in custody matters in Her Honor's analysis and application of each of the statutory factors provided in New Jersey's Grandparent and Sibling Visitation statute. (PA73-84).

The New Jersey statute places the burden on the grandparent to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child. N.J. STAT. ANN. § 9:2-7.1 (2003). The statute does not address the impact on situations in which a parent makes an offer of visitation that a grandparent finds unacceptable. *Id.*

The trial court judge investigated whether the children would be harmed by a determination of visitation as offered by the parent. (PA84). The court heard testimony from a custody expert, who opined that the limited visitation offered by the parent would not have been sufficient to overcome the campaign of alienation that the parent and his wife had engaged in towards the grandparents – the expert was concerned that the children would associate themselves with the "evil" that their father conveyed to them about their mother, which could be very destructive psychologically to the children. (PA84.)

Although the trial judge stated that she gave deference to the parent's wishes, the perceived harm that could come to the children without regular and substantial visitation with their grandparents led Her Honor to ultimately order visitation that was more than what Mr. Moriarty offered but less than what the grandparents requested. (PA86).

The Appellate Division found no fault with the lower court's factual findings but overturned the decision, holding that interference with a fit parent's decision to afford limited visitation was constitutionally impermissible. (PA63-64). On review, the New Jersey Supreme Court in *Moriarty* was keenly aware that its determination of the grandparent visitation issue necessarily implicated a fundamental right, parental autonomy, and thus held that the New Jersey Grandparent Visitation Statute was subject to strict scrutiny. *Moriarty*, 177 N.J. at 103, 827 A.2d at 214.

The New Jersey Supreme Court interpreted *Troxel* to indicate that the "best interest" standard articulated in the Washington Statute was insufficient to serve as a compelling

state interest. *Moriarty*, 177 N.J. at 108, 827 A.2d at 217-18. Further, *Troxel* instructs that:

> [A] fit parent has a fundamental due process right to the care and nurturance of his or her children; that that right is protected where a nonparental visitation statute respects a fit parent's decision regarding visitation by (1) according him or her the "traditional presumption" that a fit parent acts in the best interests of the child; and (2) giving "special weight" to a fit parent's determination regarding visitation. *Id.*

Therefore, the New Jersey Supreme Court was careful to apply an analysis that would encompass the factors that the *Troxel* Court indicated appropriate for constitutional application of grandparent visitation statutes. The New Jersey Supreme Court noted that many other states' courts have undertaken a strict scrutiny review of grandparent visitation questions, with the majority of these courts having rejected any compelling interest short of harm to the health or welfare of a child. *Moriarty*, 177 N.J. at 109-110, 827 A.2d at 218-19. Indeed, prior to *Moriarty*, New Jersey jurisprudence established that:

> [T]he only state interest warranting the invocation of the State's *parens patriae* jurisdiction to overcome the presumption in favor of a parent's decision and to force grandparent visitation over the wishes of a fit parent is the avoidance of harm to the child. . . . [W]hen harm is proved and the presumption in favor of a fit parent's decisionmaking is overcome, the court must

> decide the issue of an appropriate visitation schedule based on the child's best interests.

Moriarty, 177 N.J. at 115, 827 A.2d at 222.

The New Jersey Supreme Court was satisfied that this Court's prior decisions fully support its conclusion that interference with the fundamental right to childrearing will be tolerated only to avoid harm to the health or welfare of a child. *Id.* Accordingly, the court held that a threshold harm standard must be applied, in addition to the provisions of the statute. *Moriarty*, 177 N.J. at 118, 827 A.2d at 224.

Taken together, the harm to the child standard, combined with the statutory factors (which are based on the best interests of the child), satisfy the Due Process Clause of the Fourteenth Amendment. *Troxel*'s indication that Due Process requires that special weight be afforded to a fit parent's determination regarding visitation is addressed, because the presumption that a fit parent makes a decision in the best interest of his or her child is not overcome until the additional showing of harm to the child has been met.

The state has a duty under the *parens patriae* doctrine, as well as a compelling interest, to safeguard the health, safety, and well-being of its children. It must balance these interests with their parent's fundamental right to raise their children as they see fit. Contrary to the Washington Supreme Court in *Troxel*, there was no presumption in favor of the grandparents in Moriarty. The New Jersey statute squarely places the burden of proof on the grandparents to prove that visitation is in the children's best interests, when the statutory factors are applied to the case. *See* N.J. STAT. ANN. § 9:2-7.1 (2003). The harm requirement provides the constitutional

protection that *Troxel* and New Jersey jurisprudence indicate is needed to constitutionally infringe on a parent's fundamental rights to raise his or her child. *Moriarty*, 177 N.J. at 114-15, 827 A.2d at 222.

This Court's decision to not articulate the precise scope of the parental due process right in the visitation context was sound. With the "almost infinite variety of family relationships that provide our ever-changing society," *Troxel*, 530 U.S. at 90, the state legislatures and courts are the proper venue to address these sensitive, fact-specific and often highly emotional visitation issues. As Justice Scalia stated in his *Troxel* dissenting opinion:

> I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people. *Troxel*, 530 U.S. at 93 (Scalia, J., dissenting opinion).

Indeed, the issue of grandparent visitation is one of the many important and delicate areas in the family law arena that depend on the states for formulation and interpretation. The fact that states may vary in their formulation of visitation standards is a by-product of this Court's acceptance, indeed, accedence to, the states' role in the formation of standards and the application of these standards to fact-sensitive family law cases. Each state has its own priorities, goals and legislative mandates, which the state courts must incorporate in their oversight roles as constitutional sentinels.

For example, states laws are written and/or interpreted differently and vary amongst the states regarding who may get married and/or receive the benefits of marriage, (*See* VT. STAT. tit. 15, § 1201 (2003) (same-sex couples may enter into civil union); FLA. STAT. ch. 741.212 (2003) (state does not recognize same-sex unions)), grounds for divorce, (*See* CAL. FAM. CODE § 2310 (2003) (marriage dissolution on the basis of irreconcilable differences or incurable insanity); TEX. FAM. CODE § 6.001-6.007 (2001) (grounds for divorce include insupportability, cruelty, adultery, conviction of felony, abandonment, living apart, and confinement in a mental hospital); 750 ILL. COMP. STAT. 5/401 (2003) (grounds for dissolution include impotence, habitual drunkenness for two years, infecting other spouse with a sexually transmitted disease, attempting to take the life of the other spouse by poison or means showing malice)), and the division of marital property (*See* CAL. FAM. CODE § 760 (2003) (property acquired during the marriage is community property); IDAHO CODE § 32-906 (2003) (property acquired during the marriage is community property); N.J. STAT. § 2A:34-23.1 (2003) (court considers factors in equitable distribution of property)). Similarly, the constitutional application of grandparent visitation statutes is properly situated with the states and further guidance from this Court is not necessary, absent a constitutional imperative.

II. The New Jersey State Supreme Court Approved An Appropriate Standard To Sufficiently Protect The Right Of Parents To Childrearing

As discussed *supra*, the *Troxel* Court acknowledged that it was not establishing the exact scope of the parental due process right in the visitation context. *Troxel*, 530 U.S. at 73. Indeed, the Court was hesitant to hold that specific

nonparental visitation statutes violate the Due Process clause of the Fourteenth Amendment because visitation cases are often factually intensive and adjudicated on a case-by-case basis. *Id.*

The New Jersey State Supreme Court concluded that the Grandparent and Sibling Visitation statute implicates a fundamental right, and thus it is subject to strict scrutiny and must be narrowly tailored to advance a compelling state interest. *Moriarty*, 177 N.J. at 114, 827 A.2d at 222. Furthermore, a grandparent must prove that visitation is in the child's best interests and also that the child will be harmed if the visitation requested is not granted, in order to overcome the presumption in favor of a parent's rights to make decisions in matters concerning his or her child. *Moriarty*, 177 N.J. at 115, 827 A.2d at 222. Once harm is proved and the presumption of parental fitness is overcome, the court must decide an appropriate visitation schedule based on the child's best interests. *Id.*

After analyzing and establishing the standard to be applied for grandparent visitation, the *Moriarty* Court compared a third party's application for the custody of a child to a third party's application for visitation. *Moriarty*, 177 N.J. at 116-17, 827 A.2d at 223. Although both applications implicate the right to the fundamental interests of family autonomy and privacy, the court opined that it would be unrealistic not to differentiate between the two. *Id.*

The court reasoned that an application to live with and take responsibility for a child certainly entails a greater level of family intrusion than an application to visit at shorter intervals. *Id.* Therefore, the court declined to apply the same evidentiary standard for the two, and reasonably declined to

require grandparents to prove by clear and convincing evidence the necessity for visitation to avoid harm to the children. *Id.*

The court concluded that a fit parent's decision should be afforded special weight, and where parents deny visitation, or offer inadequate visitation, the grandparent bears the burden of establishing by a preponderance of the evidence that visitation is in the best interests of the child as well as necessary to avoid harm to the child. *Id.* Hence, the court held that the best interests of the child test, combined with the harm standard, fully protects the fundamental rights of parents when faced with challenges from grandparents to visitation. *Id.*

The New Jersey State Supreme Court was not required under *Troxel* to apply a clear and convincing evidentiary standard. Under substantive due process, government decisions that affect liberty interests do not require a clear and convincing standard. The standard established by the New Jersey State Supreme Court is sufficient because it protects the fundamental rights of parents while also protecting children from arbitrary or misguided parental decisions.

This Court stated in *Mathews v. Eldridge*, that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." 408 U.S. 319, 321(1976) (*quoting Morrisey v. Brewer*, 408 U.S. 471 (1972)). Admittedly, while *Eldridge* dealt with procedural due process in a disability benefit termination, the lessons learned can be applied here as well. The *Eldridge* Court propounded three factors to be evaluated in deciding what due process requires. *Id.* These factors include: (1) the private interest that will be affected by the government action; (2) the risk of error created

by the State's chosen procedure; and (3) the government's interest in using the challenged procedure. *Id. See also Santosky v. Kramer*, 455 U.S. 745, 754 (1982); *Lassiter v. Dept. of Soc. Serv.*, 452 U.S. 18, 27 (1981).

A court's determination based on these factors may derive a constitutionally sufficient result in which the federal Due Process Clause is satisfied though an evidentiary standard lower than clear and convincing evidence is applied. *Moriarty v. Bradt* is one such example. The interests to be balanced are: (1) the interest of the parents in their fundamental right to raise their children as they see fit, as well as the well-being of their children; (2) the interest of the State in the welfare of its children and avoiding harm to them, fulfilling its duty as *parens patriae*, and promoting grandparent-grandchild relationships; and (3) the risk that the use of a preponderance standard will lead to erroneous decisions.

The New Jersey State Supreme Court made a deliberate, thoughtful decision to apply a preponderance evidentiary standard to grandparent visitation challenges, as opposed to the high "clear and convincing" standard applied in custody cases. *Moriarty*, 177 N.J. at 116-17, 827 A.2d at 223. It necessarily had to balance the interest in protecting parental autonomy with the interest in preventing harm to the children involved – two interests of great import. In combining the "best interests" standard with the "harm to the child" standard, the court minimized the risk that grandparents would be awarded visitation when it was not in the best interests of the child.

In selecting the "preponderance of the evidence" standard, the court allocates the risk of error equally to the parents and the grandparents, but provides two tests, in the form of two

standards, for the grandparents to pass. It is clear from the court's decision that it did not believe that grandparents should be required to clear as high a legal hurdle as a third party seeking custody would be required. *Moriarty*, 177 N.J. at 116-17, 827 A.2d at 223. By complying with *Troxel* and ensuring that parental autonomy was afforded due process protection through sufficient standards, the New Jersey State Supreme Court applied the appropriate evidentiary standard of review and it respectfully need not be reviewed by this Court.

CONCLUSION

The New Jersey Supreme Court made a constitutionally sound decision regarding grandparent visitation in *Moriarty v. Bradt*. The United States Supreme Court has recognized that state legislatures and state courts are the appropriate venues for the determination of the laws that govern the emotionally charged family law field in their respective states. The New Jersey Grandparent and Sibling Visitation Statute was not challenged on its face – and the New Jersey Supreme Court took care to ensure that sufficient tests were established for constitutional application of the state statute. The *Moriarty* court's grandparent visitation determination balanced the due process rights of the parents, with the rights of the grandparents and the state's goal of protecting the welfare of its children. Ultimately, preventing harm to the children was the *Moriarty* court's polestar, which resulted in a fair determination of visitation with their grandparents.

Accordingly, this case does not merit further review by the Honorable Court. For the foregoing reasons, Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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